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Vietnam: A Twenty Year Retrospective

Matthew Lippman*

January 23, 1993 marks the twentieth anniversary of the signing of the Paris Peace Accords between the United States and the Democratic Republic of Vietnam.¹ This Treaty ended American involvement in the Vietnam War. The twentieth anniversary of the termination of the conflict provides an opportunity to review the international legal controversy surrounding the war and to begin to assess the war's significance.²

Initially, the historical roots of the Vietnam conflict are sketched. Then, the debate over the international legality of United States involvement in Vietnam and the refusal of American courts to address the justifiability of American intervention are outlined. The next section presents an overview of United States military tactics and strategies. The judiciary's refusal to definitively determine the legality of American involvement in Vietnam sent a signal that the American leadership was free to disregard the rule of law in the prosecution of the war. A sophisticated technological assault was launched against a third world guerilla army which resulted in an infamous record of war crimes for which neither ordinary combatants nor military and civilian leaders were held accountable. While the rule of law was abandoned abroad, it was strictly enforced at home. Those who refused to serve in Vietnam or who engaged in civil disobedience against the war were portrayed as threatening social stability and were subjected to criminal prosecution and punishment. Americans have yet to confront their moral responsibility for the damage inflicted upon innocent Vietnamese. The "kicking of the

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1. Paris Agreement on Ending the War and Restoring Peace in Vietnam (Jan. 27, 1973), T.I.A.S. No. 7542, 12 I.L.M. 58.

2. There have been few efforts to review the legality of the Vietnam War under international law. For a reassessment of the constitutionality of American involvement in Vietnam, see John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990); John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990). Readers will appreciate that it is necessary to selectively utilize sources in writing an article about such a complex subject. Arguments inevitably must be simplified or summarized. A best survey of the issues surrounding the Vietnam War is contained in four edited volumes sponsored by the American Society of International Law. See I-IV THE VIETNAM WAR AND INTERNATIONAL LAW (R.A. Falk ed., 1968).

Vietnam Syndrome" requires that the United States begin to make amends and to persuade the rest of the world that it is willing to adhere to the rule of law rather than to rely upon military muscle.

I. The Roots of the Conflict

The history of Vietnam is characterized by a struggle to break the manacles of foreign domination and occupation.³ Modern Vietnamese history is dated from roughly 208 B.C. when a renegade Chinese warlord invaded the Red River Delta. A Sino-Vietnamese autonomous kingdom was established which persisted until 111 B.C. when the territory was annexed and reconstituted as a Chinese province.⁴ The Vietnamese admired and absorbed many aspects of Chinese civilization. However, in 939 A.D. they revolted and declared their independence.⁵ In the early fifteenth century the Chinese reasserted their control over Vietnam, only to be expelled in 1427 A.D. by the great warrior Le Loi.⁶ Despite their independence, the Vietnamese remained in constant fear of domination by their northern neighbor and continued to pay tribute to the Chinese Emperor.⁷

The Vietnamese now were free to direct their energies towards securing the underbelly of their country and, thus, began to expand southward. In 1471 the Vietnamese overran the Indonesian kingdom of Champa. The boundaries of modern Vietnam were completed in the seventeenth century when the Vietnamese asserted control over the Khmer controlled Mekong River Delta.⁸ During the seventeenth and eighteenth centuries, political power was divided between the Trinh in the north and the Nguyen in the south.⁹ The country finally was unified by Emperor Gia Long who ruled between 1802 and 1820. Gia Long was succeeded by three other Nguyen emperors whose reign lasted until 1883.¹⁰

The Nguyen emperors attempted to insulate Vietnam from western influence. They were particularly suspicious of French Catholic missionaries whom they viewed as the first wave of an impending

3. Vietnam has been described as an "S" running from the southern border of China to the tip of the Indochinese peninsula. It stretches for more than 1,200 miles, nearly equaling the length of the entire Pacific Coast of the continental United States. Vietnam is comprised of 127,000 square miles. The country's width varies from as little as thirty-three to as much as three hundred miles. GEORGE M. KAHIN & JOHN W. LEWIS, *THE UNITED STATES IN VIETNAM* 3 (Rev. ed. 1967).

4. JOHN T. MCALISTER, JR., *VIET NAM, THE ORIGINS OF REVOLUTION 17-8* (1969). The kingdom of Viet Nam was comprised of present-day Vietnam and southern China. *Id.* at 17.

5. KAHIN & LEWIS, *supra* note 3, at 4.

6. Roy Jumper & Marjorie W. Normand, *Vietnam: The Historical Background*, in *VIET NAM HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS* 10, 12 (1965).

7. MCALISTER, *supra* note 4, at 21.

8. KAHIN & LEWIS, *supra* note 3, at 5.

9. Jumper & Normand, *supra* note 6, at 15.

10. *Id.* at 16-18.

ing western storm which threatened to engulf Vietnam.¹¹ The emperors' repressed the French missionaries-imprisoning, expelling, and executing the Christian crusaders.¹² This repression provided the pretext for a joint Franco-Spanish task force to invade Danang. In February 1859, the joint force turned south and captured Saigon. Spanish ambitions were focused on Latin America, and they had little interest in remaining in Asia. French colonial ambition, however, remained unrequited, and by 1883, they had extended their control over the entire territory of Vietnam.¹³

The French attempted to discourage the assertion of Vietnamese nationalism by dividing the country into three administrative units which both reflected and promoted regional and cultural differences.¹⁴ Governmental power was concentrated in a colonial elite which displaced the indigenous Confucian trained administrators.¹⁵ The French asserted exclusive control over mineral extraction, the rubber industry, manufacturing and monopolizing the sale of alcohol, opium and salt. This deprived many Vietnamese of their livelihood and inflated prices. Peasants were further impoverished by high taxes and interest rates and found themselves dispossessed from their land. The land was consolidated into large plantations and the peasants were reduced to a condition of serfdom in which they lived and worked under conditions approximating peonage.¹⁶ At the same time, there were few opportunities for the privileged few Vietnamese who managed to obtain a French education.¹⁷ Nationalists who advocated reform or revolution were jailed and most fled abroad.¹⁸

In the nineteenth century, there were some localized and loosely organized rebellions which were motivated by a fear that traditional Vietnamese society was being uprooted and supplanted by continental culture. Vietnamese opposition movements in the first quarter of the twentieth century became increasingly nationalistic and couched their appeals in terms of revolutionary doctrine and communism.¹⁹ The destruction of the nationalist Quoc Dan Dang (VNQDD) in the 1930s led to the emergence of the Indochinese Communist Party headed by Ho Chi Minh as the major opposition force.²⁰ HO possessed strong nationalist credentials. As early as 1919, he had ad-

11. KAHIN & LEWIS, *supra* note 3, at 5, 8.

12. Jumper & Normand, *supra* note 6, at 18-19.

13. *Id.* at 19.

14. MCALISTER, *supra* note 4, at 43-45. Cochinchina, Annam and Tonkin are Chinese and Western terms applied to the territorial divisions in Vietnam. *Id.* at 43.

15. Jumper & Normand, *supra* note 6, at 22.

16. *Id.* at 23.

17. KAHIN & LEWIS, *supra* note 3, at 10.

18. *Id.* at 13-14.

19. MCALISTER, *supra* note 4, at 56.

20. KAHIN & LEWIS, *supra* note 3, at 11.

addressed a memorandum to the Great Powers at the Versailles Conference demanding self-determination for the Indochinese.²¹ On the eve of World War II, the Communist Party remained the strongest and best organized revolutionary force in Vietnam. The party attracted support and allegiance from a wide array of Vietnamese and was in the vanguard of opposition to French colonialism.²²

The Japanese seized the opportunity created by the Nazi invasion of France in 1940 to demand that the French recognize Japanese sovereignty over Indochina. The Japanese were content to leave the French administration and security forces in place while reserving the right of transit through Indochina as well as asserting control over military facilities and economic resources.²³ The Indochinese Communist Party assumed the leadership of the Vietnam Doc Lap Dong Minh Hoi (Vietnamese Independence League), or Vietminh, which was the national front resistance organization.²⁴ Recognizing that the Vietminh was the most formidable opposition force in Indochina, the United States funneled assistance to Vietminh guerrillas. In return, the Vietminh helped to rescue American pilots and provided intelligence to the Allied Forces.²⁵

As the Japanese surrendered to the Allies, the Vietminh entered and seized Hanoi and Saigon. They formed the Provisional Government of the Democratic Republic of Vietnam, and on September 2, 1945, they declared Vietnam a sovereign state.²⁶ In a statement reminiscent of the American Declaration of Independence, Ho Chi Minh publicly proclaimed the independence of the Democratic Republic Vietnam (DRV) on September 2, 1945:

We hold truths that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, among these are Life, Liberty and the pursuit of Happiness. . . .

We are convinced that the Allies who have recognized the principles of equality of peoples at the Conferences of Teheran and San Francisco cannot but recognize the Independence of Viet Nam.

A people which has so stubbornly opposed the French domination for more than 80 years, a people who, during these last years, so doggedly ranged itself and fought on the Allied side against Fascism, such a people has the right to be free; such a people must be independent.

21. *Id.* at 12.

22. *Id.* at 14.

23. *Id.*

24. *Id.* at 16-17.

25. KAHIN & LEWIS, *supra* note 3, at 17-18.

26. *Id.* at 18-19. Bao Dai, the "puppet king" of Annam for twenty years under both the French and the Japanese, abdicated in favor of the new regime. *Id.* at 18.

For these reasons, we, the members of the Provisional Government of the Democratic Republic of Viet Nam, solemnly declare to the world:

'Viet Nam has the right to be free and independent and, in fact, has become free and independent. The people of Viet Nam decide to mobilize all their spiritual and material forces and to sacrifice their lives and property in order to safeguard their right of Liberty and Independence.'²⁷

The unified Democratic Republic of Vietnam was short-lived. The victorious Allied Powers divided Vietnam at the sixteenth parallel. The British were given a mandate in the south and the Chinese in the north. Both were to detain, disarm, and repatriate the remaining Japanese troops.²⁸ The British immediately declared martial law, suppressed the media, disarmed the Vietminh police and militia and then turned control back to the French.²⁹ In contrast, the Chinese fulfilled the terms of their mandate and recognized the de facto authority of the Vietminh.³⁰ The French, however, were determined to regain control of the entire country of Vietnam. On February 28, 1946, the Chinese agreed to withdraw from the north. In return, France renounced all their extraterritorial rights in China and transferred their concessions in Canton, Hankow and Shanghai to the Chinese. The Allied Powers clearly had no interest in establishing an independent and unified Vietnam. The Vietnamese found themselves bereft of allies, debilitated by the war and weakened by the looting of their economy by the Chinese. They realized that they were unable to effectively challenge the French and felt compelled to enter into an agreement.³¹

The French adamantly refused to assent to Vietnamese independence. Instead, they rather ambiguously agreed to recognize the Republic of Vietnam as a "free state which has its government, its parliament, its army, and its finances, as is a part of the Indochinese Federation and of the French Union."³² The French also pledged to conduct a referendum concerning the unification of Vietnam. The Vietnamese, in turn, promised to "receive the French Army in a peaceful manner."³³

27. DECLARATION OF INDEPENDENCE OF THE DEMOCRATIC REPUBLIC OF VIETNAM (1945) in *VIETNAM A HISTORY IN DOCUMENTS* 28, 29-30 (Gareth Porter ed., 1979).

28. Harold Isaacs, *Independence for Vietnam?* in *VIETNAM HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS* 37, 42-43 (1965).

29. *Id.* at 44-47.

30. *Id.* at 51.

31. KAHIN & LEWIS, *supra* note 3, at 25.

32. *Preliminary Franco-Vietnamese Convention*, Mar. 6, 1946, in *VIETNAM A HISTORY IN DOCUMENTS* 42, art. 1 (Gareth Porter ed., 1979).

33. *Id.* at art. 2. See also *Franco-Vietnamese Modus Vivendi*, Sept. 14, 1946 in *Id.* at 48.

This bilateral agreement reduced tensions. However, it quickly became apparent that the French had no intention of relinquishing their claim to Vietnam. Negotiations between the two parties concerning Vietnamese autonomy were unproductive and stalled. The French then announced they planned to establish a Vietnamese government which was sympathetic to French interests.³⁴ Tensions between the parties escalated. On November 23, 1946, the French initiated a naval bombardment of Haiphong, killing six thousand Vietnamese civilians.³⁵ The French demanded that the DRV recognize French military control over the Haiphong and the surrounding area. On December 8, the French continued their offensive and occupied Hanoi. The Vietminh withdrew their forces into the rural areas and retaliated by initiating a coordinated attack against the French.³⁶

On June 5, 1948, the French installed Bo Dai as Emperor of the State of Vietnam.³⁷ In 1949, the United States began to assist the French in their struggle against the Vietnamese, and in February 1950, America extended diplomatic recognition to the Bo Dai government.³⁸ United States involvement was based on Vietnam's strategic significance as a bulwark against the ambitions of the newly-installed Communist Chinese regime. American officials no longer viewed the struggle between the French and Vietnamese as a localized colonial conflict. Ho Chi Minh and his supporters increasingly were perceived as a central component in the international communist conspiracy. The clash in Vietnam now was elevated into a litmus test of the determination of western democracies to resist the spread of Communism in Southeast Asia. It was believed that defeat in Vietnam would lead to the growth of the "red menace" throughout Southeast Asia and eventually to Japan.³⁹ The Soviet Union and

34. KAHIN & LEWIS, *supra* note 3, at 26.

35. *Id.* at 27.

36. GEORGE M. KAHIN, *INTERVENTION HOW AMERICA BECAME INVOLVED IN VIETNAM* 24 (1986).

37. See *The Ha Long Bay Agreement June 5, 1948*, in *VIET-NAM CRISIS A DOCUMENTARY HISTORY VOLUME I: 1940-1956* 117 (Allan W. Cameron ed. 1971) [hereinafter Cameron]. The French commitment to Vietnam appears to have been based on a fear that the loss of the country would lead to a crumbling of their entire colonial empire. As early as 1950, France's military expenditure in Vietnam surpassed the total of all French investments in Indochina. KAHIN & LEWIS, *supra* note 3, at 27.

38. *United States Recognition of Increased Sovereignty in the State of Viet-Nam: Note from United States Ambassador-at-Large Philip C. Jessup to H.M. Bao Dai*, Jan. 27, 1950 in *id.* at 143. See also *United States Recognition of Viet-Nam, Laos, and Cambodia: Statement by the Department of State*, Feb. 7, 1950 in *id.* at 146. Thirty other States accorded recognition to the Bao Dai government. KAHIN & LEWIS, *supra* note 3, at 31. American support for the French campaign in Vietnam grew from roughly 150 million dollars per year in 1950 to over one billion dollars in fiscal year 1954, when the United States was paying roughly eighty per cent of the cost of the war. Announced expenditures in 1955 equalled one-third of the entire American foreign aid program. *Id.* at 32.

39. KAHIN & LEWIS, *supra* note 3, at 31.

People's Republic of China responded by according diplomatic recognition to the Democratic Republic of Vietnam.⁴⁰ The French responded by characterizing the Sino-Soviet action as violative of international law, since the "sole legitimate government of Viet-Nam is the government formed by H.M. Bao Dai, to which the French Government has transferred the rights of sovereignty which it previously held."⁴¹ Secretary of State Dean Acheson proclaimed that the Kremlin's recognition of "Ho Chi Minh's Communist movement in Indochina . . . should remove any illusions as to the 'nationalist' nature of Ho Chi Minh's aims and reveals Ho in his true colors as the mortal enemy of native independence in Indochina."⁴²

By mid-1953, the Vietminh controlled all but a small portion of the country.⁴³ France's dead, wounded, missing, and captured totalled more than ninety thousand over the course of the six year conflict. French military spending was double the total it had received in United States assistance under the Marshall Plan.⁴⁴ In desperation, the French launched a major military offensive termed the "Navarre Plan." This effort culminated in a disastrous defeat at Dienbienphu in 1954. Dienbienphu was a fortress situated in a valley on the former Vietminh invasion route into Laos at the western extremity of northern Vietnam. The French strategy was to induce the Vietminh to attack the heavily armed fortress. The French calculated that their heavy artillery and aircraft would then crush the Vietminh. The French, however, underestimated the ardor and size of the forces arrayed against them.⁴⁵ They quickly realized that their forces were on the verge of a devastating defeat.

France urgently requested American intervention. The specter of a Vietminh victory sparked a major debate within the Eisenhower administration. Some advocated the deployment of nuclear weapons. Others were reluctant to risk a possible conflict with China. In the end, the lack of Congressional and British support for such an endeavor tilted the scales against American involvement. On May 7, 1954, after two months of fighting, the French capitulated and the Vietminh flag was raised over Dienbienphu.⁴⁶ American intelligence

40. *Recognition of the Democratic Republic of Viet-Nam by the People's Republic of China, Jan. 15, 18, 1950* in Cameron, *supra* note 37, at 142; *Recognition of the Democratic Republic of Viet-Nam by the Soviet Union January 20, 1950* in Cameron, *supra* note 37, at 143. See generally *1952 Policy Statement by U.S. on Goals in Southeast Asia*, Neil Sheehan et al., *THE PENTAGON PAPERS* 27 (1971) [hereinafter Sheehan].

41. *French Government Protest against Soviet Recognition of the Democratic Republic of Viet-Nam, January 31, 1950*, Cameron, *supra* note 37, at 144.

42. *Secretary of State Dean Acheson: Statement on Soviet Recognition of the Democratic Republic of Viet-Nam, February 1, 1950*, Cameron, *supra* note 37, at 145. at 145.

43. KAHIN & LEWIS, *supra* note 3, at 35-36.

44. STANLEY KARNOW, *VIETNAM A HISTORY* 203 (rev. ed. 1991).

45. KAHIN & LEWIS, *supra* note 3, at 36-37.

46. KARNOW, *supra* note 44, at 214.

indicated that the Vietminh now controlled the country and, had elections been held, Ho Chi Minh would have won eighty percent of the vote. The British Chiefs of Staff agreed with the American assessment and concluded that virtually all of Vietnam, Laos and Cambodia were under or subject to, imminent Vietminh control.⁴⁷ The French position in Indochina now had become untenable—the next morning in Geneva, nine national delegations convened to discuss a peace settlement.⁴⁸

The Geneva Conference drafted two separate but interrelated instruments. The first was a set of bilateral armistice agreements between the DRV and France and between the DRV and the Franco-Laotian and Royal Khmer army commands. The second was a multinational, thirteen-point, Final Declaration orally endorsed by the DRV, France, Great Britain, China, and the Soviet Union. The United States and the State of Vietnam refused to endorse the Declaration.⁴⁹

The DRV and France entered into the Agreement on the Cessation of Hostilities in Viet-Nam.⁵⁰ Article 1 established a provisional military demarcation line. The People's Army of Vietnam were to withdraw and regroup to the north of the line and the forces of the French Union to the south.⁵¹ This process was to be completed within three hundred days.⁵² "Pending the general elections which will bring about the unification of Viet Nam,"⁵³ administration of the southern zone was to be in the hands of the French while administration of the northern zone was to be the responsibility of the Vietminh.⁵⁴ The introduction of reinforcements in the form of arms, munitions, and other war materials was prohibited.⁵⁵ No military base under the control of a foreign State was to be established in either zone. The two Signatory Parties also were required to ensure that the zones did not enter into any military alliances and were not used for the resumption of hostilities or to further an aggressive policy.⁵⁶ Each Party also pledged to refrain from any reprisals or dis-

47. KAHIN, *supra* note 36, at 53.

48. KARNOW, *supra* note 44, at 214. The Vietminh experienced greater success in the North than in the South. They were able to garrison and easily supply northern troops from China. In the south they also competed for loyalty with various charismatic religious cults. F. FITZGERALD, *FIRE IN THE LAKE THE VIETNAMESE AND THE AMERICANS IN VIETNAM* 88-89 (1972).

49. KAHIN, *supra* note 36, at 61.

50. Agreement on the Cessation of Hostilities in Viet-Nam (July 20, 1954) in Cameron, *supra* note 37, at 288.

51. *Id.* at art. 1.

52. *Id.* at art. 2.

53. *Id.* at art. 14(a).

54. Agreement on the Cessation of Hostilities in Vietnam, art. 14(a), in Cameron, *supra* note 37; *see also* art. 8.

55. *Id.* at art. 17(a).

56. *Id.* at art. 19.

crimination against persons or organizations on account of their activities during the Indochinese conflict and guaranteed to protect democratic liberties.⁵⁷ During the period in which troops were withdrawn and transferred, civilians were to be "permitted and helped" to move between zones.⁵⁸ An International Commission was established, charged with responsibility for the control and supervision of the agreement.⁵⁹ The Commission was to decide most issues by majority vote.⁶⁰ However, questions concerning violations or threats of violations which might lead to a resumption of hostilities were to be decided by a unanimous vote.⁶¹

The Agreement on the Cessation of Hostilities was based on an exchange of territory for elections. The Vietminh temporarily ceded land in exchange for a commitment by the French to conduct a national election.⁶² Absent this assurance, the Vietnamese undoubtedly would never have entered into an armistice agreement.⁶³ It also was significant that both Moscow and Peking desired to end the conflict and pressured the Vietnamese to accept the terms of the accord.⁶⁴ The Chinese feared that a perpetuation of the conflict would lead to American intervention in Vietnam. This would pose a threat to China's southern flank.⁶⁵ The Soviet Union hoped that the termination of hostilities in Vietnam would lead France to redeploy its Indochinese troops in Europe. This would bolster NATO forces and undercut the argument that there was a need to rearm Germany as a bulwark against Soviet expansionism.⁶⁶ The United States did not support the French decision to enter into negotiations with the Vietnamese. However, the Americans were hoping for French cooperation in a proposed new European defense alliance and feared that pressuring the French to stand firm would strain their bilateral relationship.⁶⁷

The day after the signing of the armistice agreement, the Final Declaration of the Geneva Conference was endorsed by the United

57. *Id.* at art. 14(c).

58. *Id.* at art. 14(d).

59. Agreement on the Cessation of Hostilities in Vietnam, art. 14(a), in Cameron, *supra* note 37.

60. *Id.* at art. 41.

61. *Id.* at art. 42.

62. See *supra* notes 50-54 and accompanying texts.

63. KAHN, *supra* note 36, at 61. The Treaty of Independence of the State of Viet-Nam (June 4, 1954) in Cameron, *supra* note 37, at 268, in article 2 provides that "(South) Vietnam shall take over from France all the rights and obligations resulting from international treaties or conventions contracted by France" This provision meant that Vietnam would succeed to France's obligations to conduct an election. The Treaty of Independence of the State of Viet-Nam (June 4, 1954) in Cameron, *supra* note 37, at 268, art. 2.

64. KAHN, *supra* note 36, at 57.

65. *Id.* at 56.

66. *Id.* at 55.

67. *Id.* at 54-55.

Kingdom, China, the Soviet Union, Cambodia, and Laos as well as by France and the Vietminh.⁶⁸ The United States⁶⁹ and the State of Vietnam only "noted" the Declaration.⁷⁰ The Declaration expressed "satisfaction" at the ending of the hostilities⁷¹ and took notice of provisions in the armistice agreement which prohibited the introduction of foreign troops and military personnel as well as arms and munitions⁷² and banned foreign military bases.⁷³ The Conference proclaimed that the "essential purpose" of the agreement relating to Vietnam was to "settle military questions with a view to ending hostilities" and recognized that "the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary."⁷⁴ The Conference also declared that general elections should be conducted in July, 1956, under the supervision of an international commission.⁷⁵ The Declaration clearly anticipated a unified and democratic Vietnam. It proclaimed that political problems were to be settled on the basis of respect for the principles of independence, unity, and territorial integrity. The Vietnamese people also were to "enjoy the fundamental freedoms, guaranteed by democratic institutions which were established as a result of free general elections by secret ballot."⁷⁶

The Declaration reaffirmed that individuals and their property must be protected and that the Parties must "allow everyone in Viet Nam to decide freely in which zone he wishes to live."⁷⁷ The Conference emphasized that the French and Vietminh should not permit "individual or collective reprisals against persons who have collaborated in any way with one of the parties during the war, or against members of such persons' families."⁷⁸ Each member of the Geneva Conference also undertook "to respect the sovereignty, the independence, the unity and the territorial integrity" of Cambodia, Laos and Vietnam and "to refrain from any interference in their internal affairs."⁷⁹ In conclusion, the Conference pledged to consult one another on any question which may be referred to them by the International Supervisory Commission and agreed "to study such measures

68. *The Verbatim Record of the Eighth Plenary Session on Indochina [Extracts]*, July 21, 1954, in Cameron, *supra* note 37, at 308-14.

69. *Id.* at 314-15.

70. *Id.* at 315.

71. Final Declaration of the Geneva Conference (July 21, 1956), ¶ 2, in Cameron, *supra* note 37, at 305.

72. *Id.* at ¶ 4.

73. *Id.* at ¶ 5.

74. *Id.* at ¶ 6.

75. *Id.* at ¶ 7.

76. Final Declaration of the Geneva Conference (July 21, 1956), ¶ 7, in Cameron, *supra* note 37, at 305.

77. *Id.* at ¶ 8.

78. *Id.* at ¶ 9.

79. *Id.* at ¶ 12.

as may provide necessary to ensure that the agreements on the cessation of hostilities in Cambodia, Laos and Viet Nam are respected."⁸⁰

The United States was not completely averse to the settlement. A temporary Western presence in South Vietnam was preserved as a bulwark against Chinese expansion in Southeast Asia.⁸¹ However, the ghost of the recent loss of China to the Communists still haunted American domestic politics. The Eisenhower Administration did not want to appear to be acquiescing in the creation of yet another Communist beachhead in Asia. As a result, the United States refused to formally endorse the Geneva Agreement. John Foster Dulles distanced himself from the settlement by sending his deputy Walter Bedell Smith to the final sessions of the Conference.⁸² As previously noted, the most Smith was willing to do was to "take note" of the Geneva Accords.⁸³ The United States also announced that it would "refrain from the threat or use of force to disturb" the Accords and stated that it would view "any renewal of the aggression in violation of the aforesaid Agreements with grave concern and as seriously threatening international peace and security."⁸⁴

The United States also entered a significant reservation. It did not endorse paragraph 13 in which the Conference agreed to "consult" concerning those measures which may prove necessary to enforce the Agreement on the Cessation of Hostilities.⁸⁵ This reflected the United States' view that the United Nations was the proper body to supervise the armistice and to conduct elections.⁸⁶ The United States also suggested that it was not ready to endorse any arrangement which might interfere with the right to self-determination of the French-sponsored State of Vietnam.⁸⁷ Emboldened by the refusal of the United States to explicitly endorse the Accords, the State of Vietnam also took "note" of the armistice between the French and

80. *Id.* at ¶ 13.

81. The United States view of a minimally acceptable settlement is set forth in, KAHIN, *supra* note 36, at 54.

82. *Id.* at 64-65.

83. See *Verbatim Record of the Eighth Plenary Session on Indochina [Extracts]*, in Cameron, *supra* note 37, at 314 (United States Declaration).

84. *Id.*

85. *Id.* The United States only took "note" of "paragraphs 1 to 12." *Id.*

86. *Id.* at 315. Kahin suggests that this provided a basis for the United States to object to any national elections which were not conducted under the aegis of the United Nations. KAHIN, *supra* note 36, at 65.

87. *The Verbatim Record of the Eighth Plenary Session on Indochina [Extracts]*, in Cameron *supra* note 37, at 315 (United States Declaration).

With respect to the statement made by the Representative of the State of Vietnam, the United States reiterates its traditional position that peoples are entitled to determine their own future and that it will not join in an arrangement which would hinder this. Nothing in its declaration just made is intended to or does indicate any departure from this traditional position.

Id.

the Vietminh.⁸⁸

America refused to accept the inevitability of a unified Vietnam led by Ho Chi Minh. The United States quickly constructed a multi-lateral military mantle over the southern State of Vietnam. In September 1954, America and its allies met in Manila in the Philippines and organized the Southeast Asia Treaty Organization (SEATO). Secretary of State John Foster Dulles explained that the United States and the free nations of Southeast Asia now confronted "a common danger, the danger that stems from international communism and its insatiable ambition."⁸⁹ The inroads achieved in Indochina, in Dulles' view, were "bridgeheads" to be used to achieve further territorial gains.⁹⁰ As President Eisenhower had earlier explained, the Communists were engaged in a "domino" strategy: "You have a row of dominoes set up, you knock over the first one, and what will happen to the last one is the certainty that it will go over very quickly."⁹¹ Dulles argued that the only way to deter and to defeat such aggression was to agree to collectively combat Communist belligerency.⁹² This was not only a matter of self-interest, but it was also a moral obligation: "Those of us who are free and strong and not yet instantly imperiled are bound in honor to prove that freedom can protect those who, at immense sacrifice, are faithful to freedom."⁹³

In Article IV of the SEATO Treaty, the Signatory Parties—Australia, France, New Zealand, Pakistan, Philippines, the United Kingdom and the United States—pledged to act against "aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties [may] designate . . . in accordance with its constitutional processes."⁹⁴ In cases

88. *Id.*

89. John F. Dulles, *SEATO: Dulles Explains the Purposes*, in *AMERICA IN VIETNAM A DOCUMENTARY HISTORY* 172 (William A. Williams, Thomas McCormick, Lloyd Gardner & Walter LaFeber eds. 1985).

90. *Id.*

91. Dwight D. Eisenhower, *COUNTING THE DOMINOES*, in *AMERICA IN VIETNAM A DOCUMENTARY HISTORY* 156 (William A. Williams, Thomas McCormick, Lloyd Gardner & Walter LaFeber eds. 1985).

92. Dulles, *supra* note 89, at 172.

93. *Id.* at 174.

94. The Southeast Asia Collective Defense Treaty with Protocol and Understanding by the United States Sept. 8, 1954, art. IV(1) 6 U.S.T. & O.I.A. 81, in Cameron, *supra* note 37, at 342 [hereinafter SEATO Treaty].

As used in this Treaty, the "treaty area" is the general area of Southeast Asia, including also the entire territories of the Asian Parties, and the general area of the Southwest Pacific no including the Pacific area north of 21 degrees 30 minutes north latitude. The Parties may, by unanimous agreement, amend this Article to include within the treaty area the territory of any State acceding to this Treaty in accordance with Article VII or otherwise to change the treaty area.

Id. at art. VIII.

in which the territorial integrity, political independence, or sovereignty of any Party or designated State or territory in the treaty area is "threatened in any way other than by armed attack or is affected or threatened by any . . . situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense."⁹⁵ Article IV further stipulated that no action on the territory of any State or territory shall be undertaken except at the "invitation or with the consent of the government concerned."⁹⁶ The Signatory Parties to the SEATO Treaty unanimously designated "Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam" as protected States under the SEATO Treaty.⁹⁷

The Republic of (North) Vietnam charged that the SEATO Treaty violated the Final Declaration of the Geneva Conference which stipulated that the two zones shall not be incorporated into any military alliance.⁹⁸ The Republic charged that SEATO was a "flagrant violation of the Geneva Agreements, an infringement upon the independence and sovereignty of Vietnam . . . and . . . a threat to the security and peace of the peoples of South East Asia."⁹⁹

The United States now replaced the French as the central ally and financial supporter of the State of (South) Vietnam.¹⁰⁰ President Eisenhower wrote to Premier Ngo Dinh Diem of South Vietnam in October, 1954, offering to provide American financial assistance in transporting Vietnamese from the northern to the southern zone.¹⁰¹ President Eisenhower explained that the "purpose of this offer is to assist the Government of Viet-Nam in developing and maintaining a strong, viable state, capable of resisting attempted subversion or ag-

95. *Id.* at IV(2). The United States lodged a reservation to this article.

The United States of America in executing the present Treaty does so with the understanding that its recognition of the effect of aggression and armed attack and its agreement with reference thereto in Article IV, paragraph 1, apply only to communist aggression but affirms that in the event of other aggression or armed attack it will consult under the provisions of Article IV, paragraph 2.

Id. at Understanding of the United States of America.

96. *Id.* at art. IV(3).

97. *Id.* at Protocol to the Treaty, September 8, 1954, Designation of States and Territory as to which provisions of Article IV and Article III are to be applicable. The SEATO Treaty was an odd amalgam of Western and Asian States. It did not receive support from major neutral South and Southeast Asian States such as Burma, Sri Lanka, India and Indonesia. KAHIN & LEWIS, *supra* note 3, at 62. Prince Sihanouk promptly repudiated Cambodia's inclusion; and the neutralization of Laos in 1962 resulted in Laos' removal from the jurisdiction of the protocol. KAHIN, *supra* note 36, at 71.

98. *Statement by a Spokesman of the Foreign Ministry of the Democratic Republic of Viet-Nam on the Southeast Asia Collective Defense Treaty [Extract], Oct. 22, 1954, in Cameron, supra* note 37, at 348.

99. *Id.* at 349.

100. KAHIN, *supra* note 36, at 81, 84-85, 87.

101. *Message from President Eisenhower to Premier Ngo Dinh Diem, Oct. 23, 1954, in Cameron, supra* note 37, at 349.

gression through military means."¹⁰² As many as eight hundred thousand Vietnamese civilians, a substantial majority of whom, like Premier Diem, were Roman Catholics, were moved south by French and American transport.¹⁰³ The United States also subsidized the Vietnamese military, paid for roughly eighty percent of the southern regime's expenditures, and heavily subsidized the economy.¹⁰⁴ Journalist Francis FitzGerald observed: "Created, financed and defended by Americans, the Saigon regime was less a government than an act of the American will—an artificial military bureaucracy that since the beginning of the Diem regime . . . governed no one and represented no one except upon occasion the northern Catholics."¹⁰⁵

The North Vietnamese persistently requested Premier Diem to enter into negotiations concerning the elections provided for in the Geneva settlement.¹⁰⁶ The South Vietnamese regime, however, was not prepared to risk being incorporated into a unified Vietnam under the leadership of Ho Chi Minh. Premier Diem argued that the South had not endorsed the Geneva Accords and that it was not bound to cooperate or participate in the conduct of the elections.¹⁰⁷ Diem also emphasized that the North had practiced "terror" and "totalitarian methods" and that they could not be trusted to permit free elections or to guarantee democratic rights and liberties.¹⁰⁸

Diem deftly ousted Emperor Bai Dai as Chief of State, reorganized the government, and assumed the newly-created presidency of South Vietnam.¹⁰⁹ The Pentagon Papers, an internal United States study of decision-making during the Vietnam War, describes Diem as "authoritarian, moralistic, inflexible, bureaucratic and suspicious."¹¹⁰ He gradually assumed near dictatorial powers and adopted

102. *Id.* at 349-50.

103. KAHIN, *supra* note 36, at 76. This massive movement, in part, was fueled by a propaganda campaign orchestrated by the United States. *Id.* at 76-77. The Catholic population in South Vietnam tripled as a result of the migration. This brought the Catholic population to over one million, or seven percent of the entire population. KAHIN & LEWIS, *supra* note 3, at 75.

104. FITZGERALD, *supra* note 48, at 136-37.

105. FITZGERALD, *supra* note 48, at 422-23.

106. KAHIN & LEWIS, *supra* note 3, at 87.

107. *Premier Ngo Dinh Diem: Broadcast Declaration on the Geneva Agreements and Free Elections, July 16, 1955* in Cameron, *supra* note 37, at 383.

108. *Id.* at 384.

109. KAHIN, *supra* note 36, at 95. Diem called a referendum and offered the populace a choice between retaining Bao Dai and creating a democratic regime. The election appears to have been tainted by fraud and Diem received 98.2 percent of the total votes. *Id.*

Ngo Dinh Diem was from a Roman Catholic Mandarin family that had worked for the French controlled imperial regime. Diem resigned in 1933 as a result of a dispute with Emperor Bao Dai. In 1946, Diem was offered the premiership by Ho Chi Minh. He refused, in part because he held the Vietminh responsible for the murder of his brother. He left Vietnam in August 1950 and spent the next four years in the United States. Cardinal Spellman and the other members of the American Friends of Vietnam rallied behind Diem and largely were responsible for his appointment as Premier. KAHIN & LEWIS, *supra* note 3, at 66.

110. Sheehan, *supra* note 40, at 70.

various repressive laws which were administered by military courts with no right of appeal.¹¹¹ These laws were "broad enough to be used against anyone who annoyed the regime or whom it suspected of disloyalty, and just the threat of its application was sufficient to terrorize most critics into silence."¹¹² Perhaps as many as fifty thousand persons had been jailed by the end of 1956.¹¹³ Diem further solidified his control by abolishing elections for village councils and appointing local officials loyal to his regime. He further distanced himself from the local populace and alienated the large Buddhist population by appointing newly-arrived Catholics to civil service positions.¹¹⁴ Diem demonstrated little interest in land reform and assisted landlords in repossessing the lands that the Vietminh had turned over to peasants.¹¹⁵ Rents were permitted to rise¹¹⁶ and landless peasants were relocated to fortified villages.¹¹⁷ Diem also reversed the French policy of granting cultural autonomy to mountain tribes.¹¹⁸

The nationalist impulse which previously had fueled opposition to the French now generated antagonism towards the Diem regime. Diem increasingly became perceived as an oppressive and corrupt agent of the United States. Between 1956 and 1960, indigenous rebellion to Diem escalated among various peasant and Buddhist groups and former Viet Minh supporters.¹¹⁹ The North Vietnamese leadership attempted to restrain this opposition. They were preoccupied with building a socialist economy and feared American intervention. The North also believed that the Diem government inevitably would be forced out of office as a result of its own ineptitude.¹²⁰

Nevertheless, in March of 1960, a group of former Vietminh resistance fighters declared their opposition to the Diem.¹²¹ They urgently appealed to the South Vietnamese to resist Diem¹²² and put an end to "the colonial regime and fascist dictatorship of the Ngo

111. KAHIN, *supra* note 36, at 97-98.

112. *Id.* at 98.

113. KAHIN & LEWIS, *supra* note 3, at 100.

114. KAHIN, *supra* note 36, at 98.

115. *Id.* at 98-99.

116. *Id.* at 98.

117. *Id.* at 100.

118. *Id.* at 99.

119. KAHIN & LEWIS, *supra* note 3, at 109-13.

120. *Id.* at 108-10. The strength of the Vietnamese resistance movement always had been in the north. Following the cease-fire with France, some ninety thousand Vietminh withdrew from the south and regrouped in the north. Still, below the seventeenth parallel there were hundreds of thousands of Vietminh cadres and guerrillas. As United States intervention escalated, the southern forces became increasingly dependent on Hanoi for material assistance, military support and military direction. FITZGERALD, *supra* note 48, at 195-96.

121. *Declaration of Former Resistance Fighters on the Present Situation in South Vietnam Mar. 1960, (Excerpts) in* KAHIN & LEWIS, *supra* note 3, at 458.

122. *Id.*

family.”¹²³ At the Third National Congress in September, 1960, the Hanoi regime recognized the inevitability of civil war and endorsed the armed struggle against the “U.S. imperialists and their henchmen.”¹²⁴ In December, 1960, a coalition of southern religious, national, and Communist groups met and formed the National Liberation Front (NLF).¹²⁵ The first point of their ten point program called for the overthrow of the Diem government and the formation of a diverse and democratic government:

The present regime in South Vietnam is a disguised colonial regime of the United States imperialists. The South Vietnam administration is a lackey which has been carrying out the United States imperialists' political line. This regime and administration must be overthrown, and a broad national democratic coalition administration formed including representatives of all strata of people, nationalities, political parties, religious communities and patriotic personalities. We must wrest back the people's economic, political, social and cultural interests, realize independence and democracy, improve the people's living conditions, carry out a policy of peace and neutrality and advance toward peaceful reunification of the Fatherland.¹²⁶

Vice President Lyndon Johnson flew to Saigon in May 1961, and reaffirmed the United States' support for President Diem. The two leaders issued a joint declaration recognizing that Diem is “in the vanguard of those leaders who stand for freedom on the periphery of the Communist empire in Asia.”¹²⁷ The United States recognized the need to provide emergency assistance and expressed its willingness to provide “such assistance to those willing to fight for their liberties.”¹²⁸ On his return to Washington, Vice-President Johnson starkly posed the challenge facing the United States in Vietnam and Thailand:

The basic decision in Southeast Asia is here. We must decide whether to help these countries to the best of our ability or throw in the towel in the area and pull back our defenses to San Francisco and a “Fortress America” concept. More importantly, we would say to the world in this case that we don't live up to treaties and don't stand by our friends. This is not my concept. I

123. *Id.* at 460.

124. *Resolution Of The Third National Congress Of The Vietnam Workers' Party On The Tasks And Line Of The Party In The New Stage, September 1960 (Excerpts)*, in KAHIN & LEWIS, *supra* note 3, at 462.

125. *The Ten-Point Program Of The NLF December 20, 1960 (Excerpts)*, in *id.* at 464.

126. *Id.*

127. *Joint Declaration by U.S. Vice-President Johnson and Ngo Dinh Diem (May 13, 1961)*, in VIETNAM HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS 205 (1965).

128. *Id.*

recommend that promptly we move forward with a major effort to help these countries defend themselves. I consider the key here is to get our best MAAG (Military Assistance Advisory Group) people to control, plan, direct and exact results from our military aid program. In Vietnam and Thailand, we must move forward together.¹²⁹

The Kennedy Administration heeded Johnson's warning. In December, 1961, President Diem wrote to President John F. Kennedy requesting "further assistance" against the "forces of international Communism now arrayed against us."¹³⁰ President Kennedy's reply expressed the United States' determination to assist the South Vietnamese regime which confronted a "campaign of force and terror" which was being "supported and directed from the outside by the authorities at Hanoi."¹³¹ The President noted that this aggression was violative of the provisions of the Geneva Accords which were "designed to ensure peace in Vietnam and to which they [the North Vietnamese] bound themselves in 1954."¹³² Kennedy noted at the time the Geneva Accords had been signed that the United States had warned that it would view any renewal of aggression against South Vietnam with "'grave concern.'"¹³³ The President concluded that in "accordance with that declaration, and in response to your request, we are prepared to help the Republic of Vietnam to protect its people and to preserve its independence. We shall promptly increase our assistance to your defense."¹³⁴

In addition to military assistance, President Kennedy committed military advisers, technicians and American-piloted helicopters and transport and reconnaissance planes and maintenance personnel to Vietnam.¹³⁵ By the end of 1961, there were 2,067 American advisers in South Vietnam; and as of May 1962, thirty-four hundred American personnel were stationed in the country. By the end of 1962, the United States military presence had reached eleven thousand.¹³⁶ Their activities were not limited to military training. American heli-

129. *Lyndon Johnson's Report, in AMERICA IN VIETNAM A DOCUMENTARY HISTORY* 191, 193 (William A. Williams, Thomas McCormick, Lloyd Gardner & Walter LeFeber eds. 1985).

130. *Augmented U.S. Support for Ngo Dinh Diem: Correspondence With John F. Kennedy (Dec. 1961), President Diem to President Kennedy, in VIETNAM HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS* 206, 208 (1965).

131. *President Kennedy to President Diem (Dec. 14, 1961), in VIETNAM HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS* 209 (1965).

132. *Id.*

133. *Id.*

134. *Id.* President Kennedy did express reservations about committing American troops to Vietnam. See *President Kennedy's TV Interviews, Sept. 2 and 9, 1963 (Excerpts), in AMERICA IN VIETNAM A DOCUMENTARY HISTORY* 198 (William A. Williams, Thomas McCormick, Lloyd Gardner & Walter LeFeber eds. 1985).

135. KAHN, *supra* note 36, at 138.

136. *Id.* at 139.

copter companies ferried South Vietnam troops throughout the battle zone.¹³⁷ United States pilots also began to fly fixed-wing aircraft in combat against the Viet Cong (NLF guerrillas referred to as VC). President Kennedy also authorized planes piloted by Vietnamese to deploy air-delivered napalm (ignited hellied gasoline that burns deeply into the flesh) and herbicidal defoliants. A major component of the United States-Saigon strategy was the strategic hamlet program. This involved the relocation of peasants into barbed-wire, fortified villages. These strategic hamlets were designed to frustrate the ability of the Viet Cong to build political support and hide among rural peasants.¹³⁸

The distant and corrupt Diem regime, however, was unable to inspire popular and military support.¹³⁹ Widespread domestic unrest was ignited when Buddhist monks and students took to the streets to protest the alleged favored position of Catholics.¹⁴⁰ The Kennedy Administration decided to encourage and support a coup in South Vietnam. On November 1, 1963, the military took control of the government and assassinated both Diem and his chief adviser and brother Ngo Dinh Nhu.¹⁴¹ Diem was replaced by a military junta headed by General Duong Van Minh.¹⁴² This, however, did not greatly improve the situation in South Vietnam. Viet Cong influence continued to spread, military morale among the South Vietnamese troops plummeted and draft evasion increased.¹⁴³ General Minh was succeeded by a dizzying series of United States sponsored military regimes, none of which was successful in halting the relentless battlefield success of the Viet Cong.¹⁴⁴ The Pentagon Papers concludes that President Kennedy left a "Vietnamese legacy of crisis, of political instability and of military deterioration at least as alarming to policy makers as the situation he had inherited from the Eisenhower Administration."¹⁴⁵ The study criticized Kennedy's decision to build up the combat support and advisory missions "without extended study or debate" or a "precise expectation of what it would achieve."¹⁴⁶

American involvement was irremediably escalated in August,

137. *Id.* at 140.

138. *Id.*

139. KAHIN, *supra* note 36, at 142-45.

140. *Id.* at 148-50.

141. *Id.* at 178-81.

142. *Id.* at 182-83.

143. *Id.* at 207-08.

144. Successor regimes included General Nguyen Khanh, KAHIN, *supra* note 36, at 203 (Jan. 30, 1964); Phan Huy Quat, *id.* at 303-05 (Mar. 1965); Generals Nguyen Van Thieu, Nguyen Chanh Thi and Nguyen Cao Ky, *id.* at 304-05 (June 1965); Generals Nguyen Van Thieu and Nguyen Cao Ky, *id.* at 417 (Feb. 1966).

145. Sheehan, *supra* note 40, at 113.

146. *Id.*

1964, when the North Vietnamese torpedo boats allegedly launched an attack upon the United States destroyer *Maddox*. On August 4, the North Vietnamese purportedly initiated a second attack against the *Maddox* and the destroyer *Turner Joy*.¹⁴⁷ Thirteen hours later, President Johnson informed the American public that United States bombers were retaliating against North Vietnam.¹⁴⁸ The air war now had been extended to the North. In February, 1965, a 132 plane raid was ordered in reprisal for a Viet Cong attack on the United States helicopter base and advisers' barracks at Pleiku in the Central Highlands. Eight Americans were killed, 126 wounded, and ten planes were destroyed during the raid.¹⁴⁹ Less than fourteen hours later, United States planes launched a retaliatory bombing campaign over North Vietnam.¹⁵⁰ The same month, a third reprisal attack was ordered following a Viet Cong attack against a United States army barracks in which twenty-three Americans were killed and twenty-one were wounded.¹⁵¹ Finally, in March, 1965, the United States initiated a sustained bombing campaign against North Vietnam in retaliation to what it viewed as the North's continuing infiltration and aggression in the South.¹⁵² By March, 1966, the United States was dropping two-and-a-half times the bomb load per month in Vietnam that it had deployed in Korea. By August, 1966, the bomb tonnage dropped each week was greater than the tonnage directed against Germany at the peak of World War II. On July 30, 1966, the United States started bombing the demilitarized zone between North and South Vietnam.¹⁵³

Meanwhile, United States ground troops, which numbered fourteen thousand in 1963, reached 267,000 in 1966. The military presence of United States allies increased from 285 in 1964 to 29,150 in 1966. South Vietnamese regular forces rose from 157,000 in 1961 to 275,000 in 1966; Vietnamese reserve troops increased from fifty thousand to 339,000 over the same period.¹⁵⁴ By the fall of 1967, there were half a million American soldiers in Vietnam. The combined Allied and South Vietnamese armies totalled 1,300,000 soldiers—one for every fifteen people in South Vietnam.¹⁵⁵ The number of enemy troops in South Vietnam also escalated—expanding

147. KAHIN & LEWIS, *supra* note 3, at 157.

148. *Id.* at 158.

149. KAHIN, *supra* note 36, at 276-77.

150. *Id.* at 277.

151. *Id.* at 286.

152. *Id.* at 305.

153. KAHIN & LEWIS, *supra* note 3, at 186. Department of State intelligence estimates indicated that the bombing strengthened rather than diminished the determination and morale of the North Vietnamese. LARRY BERMAN, *PLANNING A TRAGEDY THE AMERICANIZATION OF WAR IN VIETNAM* 51 (1982).

154. KAHIN & LEWIS, *supra* note 3, at 185 (Table 3).

155. FITZGERALD, *supra* note 49, at 456.

from 116,000 in early 1965 to an estimated 282,000 in August, 1966. Roughly one-half of this increase was accounted for by infiltration from the North.¹⁵⁶ Casualties mounted on both sides: United States personnel killed in action increased from zero in 1960 to 3,523 in 1966; Viet Cong killed in action increased from 5,669 in 1960 to 40,149 in 1966.¹⁵⁷

American military escalation was based on the concept of "‘strategic persuasion.’"¹⁵⁸ The Americans were determined to make the North Vietnamese pay a heavy price for their aggression. The United States’ goal was to demoralize and to convince the North that America was willing to deploy whatever level of force was required to emerge victorious.¹⁵⁹ Perhaps more importantly, Vietnam was perceived as a test of the United States’ commitment to its allies in the developing world and was a demonstration of the willingness of the "most powerful nation in the world" to commit resources to defeat Communist wars of national liberation.¹⁶⁰ The Pentagon Papers concludes that the Vietnam War ultimately became "less important for what it meant to the South Vietnamese people than for what it meant to the position of the United States in the world."¹⁶¹

II. The Legality of United States Involvement in Vietnam

A. *The Organized Bar And The War*

United States involvement in Vietnam ignited a debate among lawyers and scholars over the legality of the war. During the height of the "Cold War" American leaders frequently contrasted their adherence to international law with the Soviet Union’s lawless assertion of raw power.¹⁶² The United States’ status as the self-proclaimed guardian of law and morality left America particularly vulnerable to criticism that it was violating international law in Vietnam. If America were subordinating legal principle to power, how did it differ from the Soviet Union? How could the United States claim legitimacy and respect for a policy which violated international law?

Perhaps no American personage during the Vietnam War rivaled Arthur J. Goldberg in the belief that international relations should be guided and restrained by international law. Goldberg resigned his position as an Associate Justice of the United States Su-

156. KAHIN & LEWIS, *supra* note 3, at 187.

157. *Id.* at 188.

158. *Id.* at 183.

159. *Id.* at 183-84.

160. Sheehan, *supra* note 40, at 255.

161. *Id.*

162. See generally DANIEL P. MOYNIHAN, *ON THE LAW OF NATIONS* (1990).

preme Court in order to serve as United Nations Ambassador under Lyndon Johnson.¹⁶³ Upon assuming office, Goldberg was asked which one of his experiences would prove to be the most valuable preparation for his work at the United Nations. He replied, "I would hope . . . my experience as a Justice of the Supreme Court was dedicated to the rule of law. That is what we are talking about. The great adventure of the United Nations is to bring the rule of law to bear in relation between sovereign states."¹⁶⁴ Goldberg's faith in the rule of law, at times, bordered on the utopian. In a speech at Columbia University in 1966, he observed: "Might does not make right. On the contrary, law springs from one of the deepest impulses of human nature. No doubt the contrary impulses to fight and dominate often prevail, but sooner or later law has its turn."¹⁶⁵ Noting the growing importance of international influences on national life, Goldberg queried "whether today's law student should not be expected to take at least one course in international law, just as he takes one course in torts, contracts, or property."¹⁶⁶

Goldberg's views were repeated, perhaps with less conviction, by others. Dean Rusk, Secretary of State under Lyndon Johnson, pronounced in 1968:

In international affairs, the steady consolidation of the rule of law is the alternative to the law of the jungle and is an essential condition, in this nuclear age, for the survival of man. . . .

Law forms the basis for collective action by which nations guard the peace. It knits together countries in an ever-stronger fabric of agreements about common policies and goals. Finally, it provides the tools with which mankind can deal with the utterly new problems we encounter on the earth and in space around it.¹⁶⁷

What then of the legality of United States involvement in Vietnam? Professor John Norton Moore of the University of Virginia, writing in the *Connecticut Bar Journal*, argued that lawyers were able to make an "important contribution . . . to the dialogue about

163. See *Ambassador Goldberg Holds News Conference at New York*, DEPT. ST. BULL., Aug. 16, 1965, at 272.

164. *Id.* at 277.

165. Arthur J. Goldberg, *The Rule of Law in an Unruly World*, DEPT. ST. BULL., June 13, 1966, at 936, 937.

166. Arthur J. Goldberg, *International Law in the United Nations*, DEPT. ST. BULL., Jan. 23, 1967, at 140.

167. Dean Rusk, *Consolidating the Rule of Law in International Affairs*, DEPT. ST. BULL., May 27, 1968, at 669. See also William Rogers, *The Rule of Law and the Settlement of International Disputes*, DEPT. ST. BULL., May 18, 1970, 623, 627 (Secretary of State under President Richard M. Nixon). The so-called "realists" viewed it as impractical to believe that international law could guide and restrain the relations between States. See generally Hans J. Morgenthau, *To Intervene Or Not To Intervene*, 45 FOREIGN AFF. 425 (1967). Cf. John N. Moore, *Law And National Security*, 51 FOREIGN AFF. 408 (1973).

Vietnam both in assessing the claims to legality of the participants and their advocates and in clarifying community policies about the regulations of the use of force in international relations."¹⁶⁸ He concluded that North Vietnam's deployment of force against the Saigon regime "is a major violation of the United Nations Charter to which the United States and its allies may lawfully respond by assisting the widely recognized government of South Vietnam."¹⁶⁹ Emanuel Margolis noted in response that "it is a tribute to the moral force of international law that the American involvement in this war [Vietnam] has given rise to such strong opposition both at home and abroad."¹⁷⁰ The fact is, Professor Moore's Herculean efforts to the contrary, notwithstanding, the legality of our involvement in the Vietnam war is very questionable."¹⁷¹ Margolis expressed the hope that, "unlike the case in other wars, truth will not be the first victim of this one."¹⁷²

Those lawyers and academics who expressed opposition to the war were criticized by the Johnson Administration. John A. Gronouski, Ambassador to Poland, upbraided a group at the University of Wisconsin.¹⁷³ He accused the intellectual community of adopting a critical position towards the war which was "prefabricated, official, inviolate and all too often followed by rote."¹⁷⁴

I am suggesting . . . that out of such conformity of thought have come not reasonable alternatives but valueless slogans.

Is "Stop the Bombing" really a substitute for a reasoned intellectual position? Or "Negotiate Now" or "Get Out of Vietnam" or "Defy the Draft"?

I submit that America has a right to expect something better than vague slogans offering easy solutions to complicated issues from the most trained and disciplined minds it possesses.¹⁷⁵

The majority of the legal and academic community, however, viewed the war as legal. In January, 1966, thirty-one teachers of international law at leading law schools sent President Lyndon Johnson a statement in support of United States policy in Vietnam which appeared in the *Congressional Record*.¹⁷⁶ They concluded that the

168. John N. Moore, *The Role Of Law In The Viet Nam Debate*, 41 CONN. B.J. 389, 400-01 (1967).

169. *Id.* at 401.

170. Margolis, *Escalating The Viet Nam Debate: A Reply To Professor Moore*, 42 CONN. B.J. 23, 53 (1968).

171. *Id.* at 54.

172. *Id.*

173. John A. Gronouski, *The Intellectual and American Foreign Policy*, DEPT. ST. BULL., Oct. 2, 1967, at 432.

174. *Id.* at 432.

175. *Id.*

176. 112 CONG. REC. A410 (1966).

United States "seeks only to terminate aggression originating in North Vietnam" and that its involvement in Vietnam is "lawful under general principles of international law and the United Nations Charter."¹⁷⁷ In February, another letter was sent to President Johnson by Professors Richard R. Baxter and Louis B. Sohn of Harvard, Myres S. McDougal of Yale, Neill H. Alford Jr. of the University of Virginia and William W. Bishop Jr. of the University of Michigan.¹⁷⁸ These five prominent legal academics assured the President that "the legal position of the United States in South Vietnam is clearly defensible. In fact, it would seem to be the legal position most compatible with protecting the genuine self-determination of the people of South Vietnam."¹⁷⁹ They accused those opposed to the war of being guilty of "egregious errors" which are "accentuated by an apparent blindness toward the well-documented direct and indirect aggression by the Democratic Republic of North Vietnam which the United States seeks to repel."¹⁸⁰

This endorsement of United States policy by leading experts on international law provided intellectual ammunition for those seeking the support of the American Bar Association (ABA). On February 21, 1966, the House of Delegates of the American Bar Association, on the joint recommendation of its Standing Committee on Peace and Law through United Nations and its Section of International and Comparative Law, adopted a resolution in support of the Vietnam War.¹⁸¹ The resolution concluded that "the position of the United States in Vietnam is legal under international law, and is in accordance with the Charter of the United Nations and the South East Asia Treaty."¹⁸² In May 1966, Eberhard P. Deutsch, Chair of the American Bar Association Committee on Peace and Law through United Nations, writing in the *American Bar Association Journal*, justified the decision of the House of Delegates and dismissed the argument of those opposed to the war as "grounded on an emotional attitude opposed to United States policy, rather than on

177. *Id.*

178. 112 CONG. REC. 3843 (1966).

179. *Id.*

180. *Id.* This statement was intended to refute analysis of the Lawyers' Committee On American Policy Toward Vietnam. The Lawyers Committee wrote a January 25, 1966 letter to President Johnson challenging the legality of the war. See 112 CONG. REC. 2666 (1966) [hereinafter Lawyers Committee I]. They then issued a response to the Johnson Administration's defense of the war. See 112 CONG. REC. A5801 (1966) [hereinafter Lawyers Committee II]. The most comprehensive version of their views is contained in, THE CONSULTATIVE COUNCIL OF THE LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM, VIETNAM AND INTERNATIONAL LAW AN ANALYSIS OF INTERNATIONAL LAW AND THE USE OF FORCE, AND THE PRECEDENT OF VIETNAM FOR SUBSEQUENT INTERVENTIONS (1990) [hereinafter Lawyers Committee III].

181. *Peace and Law Committee, International Law Section*, 52 A.B.A. J. 392 (1966).

182. *Id.* The resolution and brief report of the committees is reprinted in 112 CONG. REC. 5062 (1966).

law.”¹⁸³ William L. Standard, head of a lawyers group opposed to the war, responded in the July issue:

This is a solemn hour in history. We have a moral obligation to history to return to the high purposes and principles of the United Nations. We may be on the threshold of a further involvement in Asia. The United Nations Charter forbids our unilateral intervention in the circumstances which exist in Vietnam.¹⁸⁴

In 1971, the legality of the Vietnam War again was debated at the ABA's annual meeting. This time, however, opponents brought the issue to the Assembly rather than to the House of Delegates.¹⁸⁵ A resolution calling for the immediate withdrawal of all American military personnel from Indochina was debated for three hours and was defeated by a standing vote of 173 to 105.¹⁸⁶

Those favoring the resolution argued that the United States government had a constitutional responsibility to maintain “fidelity” to law in its foreign relations.¹⁸⁷ They insisted that the ABA had a special responsibility to insist that the government satisfied this constitutional obligation.¹⁸⁸ Most opponents, however, viewed Vietnam as a political rather than as a legal issue.¹⁸⁹ The Resolutions Committee issued a report which warned that “[if] the Assembly became a forum for partisan political debate and action, it would betray its

183. Eberhard P. Deutsch, *The Legality of the United States Position in Vietnam*, 52 A.B.A. J. 436, 442 (1966).

184. William L. Standard, *United States Intervention in Vietnam Is Not Legal*, 52 A.B.A. J. 627, 634 (1966).

185. *Assembly Defeats End-the-War Resolution; House Meets in New York City*, 57 A.B.A. J. 888 (1971) [hereinafter *Assembly Defeats*]. The House of Delegates is an elected body which has served as the forum for debate on Bar Association policy since its formation in 1937. The Assembly is composed of all members of the Association who register at the Annual Meeting. Attendance at Assembly sessions usually has been sparse. The only business transacted by the Assembly is the ratification of amendments to the Constitution and By-Laws, the election of individuals to fill vacancies in the House of Delegates and the consideration of resolutions. Any member of the Association may offer a resolution for consideration by the Assembly. Such resolutions initially are referred to the Committee on Resolutions which conducts a public hearing and then reports back to the Assembly. Those resolutions endorsed by the Assembly are referred to the House of Delegates which may approve, disapprove or modify the resolutions. Those disapproved or modified by the House are returned to the Assembly which may direct a referendum by the entire membership of the Association. *Id.*

186. *Id.* The resolution was modified by its sponsors to call for the withdrawal from Vietnam “as soon as a physically and logistically possible without endangering the lives of American troops.” *Id.* at 889. The Young Lawyers Section defeated the resolution to end the war by a vote of roughly two-to-one. *Id.* at 891. Three resolutions were debated and voted upon. These called for: (1) the immediate withdrawal by the United States of all American military personnel from Indochina; (2) the creation of a special body to study the respective powers of the President and Congress in entering into and conducting war; and (3) the creation of a special committee to study whether the United States' conduct of the Vietnam War has been consistent with the principles of land warfare. The first and third were rejected by the Assembly. The second was adopted with amendment. *Id.* at 888.

187. *Assembly Defeat*, *supra* note 185, at 889 (remarks of Jerome Shestack).

188. *Id.* at 890 (remarks of David L. Nixon).

189. *Id.* at 890 (remarks of Raymond Coward).

responsibility to the profession."¹⁹⁰ Others feared that the resolution "would be used by Hanoi, by the Communists, and by everybody that is opposed to the United States [A] stab in the back does just as much harm if it happens to accidentally come from a friend with the best intention as if it comes from an enemy" ¹⁹¹ John C. Satterfield of Mississippi, former President of the American Bar Association, admonished the Assembly that:

Communism must be fought somewhere, and for some foolish reason, I prefer it be fought in Vietnam rather than in Yazoo City, Mississippi, or Boston Massachusetts, . . . we are defending the free world. Our boys are giving their lives in our defense, and the defense of our lives, our children, and grandchildren, and not for some foolish matter.¹⁹²

The dispute over the legality of the Vietnam War was far from over. The legal debate would be continued and fought out in legal memorandums, articles, and ultimately before the federal courts.

B. The Position Of The United States Government

In 1961, the Department of State issued a White Paper on Vietnam which portrayed the Saigon regime as under assault by the "authorities in Hanoi and their disciplined followers in the South."¹⁹³

A 1965 White Paper reaffirmed and elaborated upon the threat posed by the North Vietnamese to the South.¹⁹⁴ The White Paper argued that South Vietnam is "fighting for its life against a brutal campaign of terror and armed attack."¹⁹⁵ According to the report, this assault is "inspired, directed, supplied and controlled by the Communist regime in Hanoi."¹⁹⁶ The Department of State noted that while this aggression has been going on for years, the pace recently has "quickenened and the threat has now become acute."¹⁹⁷

The White Paper dismissed the notion that South Vietnam was confronting an internal rebellion. It characterized the National Front for the Liberation of South Vietnam (NLF) as the "creature" of the Hanoi government.¹⁹⁸ According to the Department of State,

190. *Id.* at 889.

191. *Id.* at 890-91 (John J. Wicker Jr.).

192. *Assembly Defeats*, *supra* note 185, at 890 (remarks of John C. Satterfield).

193. Department of State, *A Threat to the Peace: North Viet-Nam's Effort to Conquer South Viet-Nam*, (1961) reprinted in KAHN & LEWIS, *supra* note 3, at 470, 472 (Introduction To The U.S. Department Of State White Paper, 1961).

194. Department of State, *Aggression From the North: The Record of North Viet-Nam's Campaign To Conquer South Viet-Nam*, DEPT. ST. BULL., Mar. 22, 1965, at 404 [hereinafter *Aggression From the North*].

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 422.

the formation of the Front was "designed to create the illusion that the Viet Cong campaign of subversion was truly indigenous to South Viet-Nam rather than an externally directed Communist plan."¹⁹⁹ The White Paper emphasized that the "hard core of the Communist forces attacking South Vietnam were trained in the North and ordered into the South by Hanoi and operated under Hanoi's direction."²⁰⁰ The Department of State rejected the notion that the forces infiltrated into the South were former southerners who had regrouped across the seventeenth parallel in 1954. It noted that the Viet Cong forces "increasingly" are comprised of "native North Vietnamese who have never seen South Viet Nam."²⁰¹ These forces are armed, equipped, and supplied by the Hanoi regime and by the North's Chinese Communist benefactors.²⁰²

The White Paper estimated that since 1959, the North had dispatched nearly 20,000 militia and 17,000 support personnel to the South. The report cautioned that the somewhat modest number of infiltrators was misleading. Forces defending against a low-intensity war require a ten-to-one ratio to defeat the guerrillas. As a result, the Department of State noted that the infiltration of five thousand guerilla fighters was the "equivalent of marching perhaps 50,000 regular troops across the border, in terms of the burden placed on the defenders."²⁰³

The Viet Cong were portrayed as relying upon intimidation, sabotage and terror. Any "official, worker, or establishment that represents a service to the people by the Government in Saigon is fair game for the Viet Cong."²⁰⁴ According to the White Paper, village officials, agricultural workers, medical personnel and teachers were targeted for assassination. The Department of State reported that in 1964, 436 South Vietnamese hamlet chiefs and other officials were killed by the Viet Cong and 1,131 were kidnapped. More than 1,350 civilians were killed by bombings and by other acts of sabotage and an estimated 8,400 were kidnapped by the Viet Cong.²⁰⁵

Today the war in Viet-Nam has reached new levels of intensity. The elaborate effort by the Communist regime in North

199. *Aggression from the North*, *supra* note 194, at 422.

200. *Id.* at 404.

201. *Id.* at 406. The Department of State estimates that as many as seventy-five percent of the more than 4,400 Viet Cong who entered the South in the first eight months of 1964 were natives of North Vietnam. *Id.* at 414. The report concedes that many of the lower level elements of the VC forces are recruited within South Vietnam. However, "the thousands of reported cases of VC kidnappings and terrorism make it abundantly clear that threats and other pressures by the Viet Cong play a major part in such recruitment." *Id.* at 407.

202. *Aggression from the North*, *supra* note 194, at 406.

203. *Id.* at 407.

204. *Id.* at 425.

205. *Id.* at 426.

Viet-Nam to conquer the South has grown, not diminished. Military men, technicians, political organizers, propagandists, and secret agents have been infiltrating into the Republic of Viet-Nam from the North in growing numbers. The flow of Communist-supplied weapons, particularly those of large caliber, has increased. Communications links with Hanoi are extensive. Despite the heavy casualties of 3 years of fighting, the hard-core VC force is considerably larger now than it was at the end of 1961.²⁰⁶

The White Paper emphasized that the United States had pledged to assist South Vietnam in combating this "open aggression."²⁰⁷ The Department of State promised that "the United States will continue necessary measures of defense against the Communist armed aggression coming from North Viet-Nam."²⁰⁸

The United States thus portrayed the South Vietnamese government as a brave and beleaguered regime which was under systematic attack by its Communist neighbor. This, according to the Department of State, was part of a long-range plan by the North to take control of the South. Hanoi initially was described as being confident that the Saigon regime would degenerate into chaos and disorder and that the North would be able to peacefully takeover the South.²⁰⁹ Frustrated by the progress and prosperity achieved by the South Vietnamese, the Department of State argued that the North had infiltrated guerilla cadres into the South and instituted an escalating campaign of armed terrorism.²¹⁰ However, "the people of the South," according to the White Paper, "have chosen to resist this threat."²¹¹ "At their request, the United States has taken its place beside them in their defensive struggle."²¹² There was little question based upon this version of the facts that America was acting morally in assisting the South Vietnamese. The question remained whether American involvement was legally justifiable under international law.

In a March 4, 1966 memorandum, Leonard Meeker, Legal Adviser of the Department of State, argued that South Vietnam and the United States were engaging in collective self-defense against armed attack from the Communist North.²¹³ According to the mem-

206. *Id.*

207. *Aggression from the North*, *supra* note 194, at 426.

208. *Id.*

209. *Id.* at 424.

210. *Id.* at 425.

211. *Id.* at 427.

212. *Aggression from the North*, *supra* note 194, at 427.

213. Leonard Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, DEPT. ST. BULL., Mar. 28, 1966, at 474 [hereinafter *Legality of United States Participation*].

orandum, the Geneva Accords of 1954 had established a provisional demarcation line between North and South Vietnam. The Accords provided for the withdrawal of military forces into their respective zones.²¹⁴ The Agreement also prohibited the use of either zone for the resumption of hostilities or to further an aggressive policy.²¹⁵ Yet, as noted in the 1965 White Paper, the North has orchestrated a covert campaign against the South.²¹⁶ The infiltration of thousands of armed troops, according to the legal memorandum, clearly constituted an "armed attack." Of course, such an "armed attack" is not easily fixed by date and hour as in the case of traditional warfare. However, there is no doubt that "it had occurred before February 1965."²¹⁷

The United Nations Charter states in Article 2(4) that "[a]ll Members shall refrain in their international relations from the threat or use of force."²¹⁸ Article 51, as noted in the memorandum, is an exception to the prohibition on the use of armed force. It provides, in part, that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."²¹⁹

Article 51, according to the memorandum, "restates and preserves" the inherent right of self-defense, which is a "long-recog-

214. *Id.* See Agreement on the Cessation of Hostilities in Viet-Nam (July 20, 1954) art. 1, in Cameron, *supra* note 37, at 288.

215. *Legality of United States Participation*, *supra* note 213, at 474. See Agreement on the Cessation of Hostilities in Viet-Nam (July 20, 1954), art. 19, in Cameron, *supra* note 37, at 288.

216. See generally *supra* notes 193-212. According to the legal memorandum, beginning in 1964 the Communists had exhausted their cadre of Southerners who had gone North. Since then, the majority of infiltrators have been native-born North Vietnamese. Today, the legal memorandum recites that nine regiments of regular North Vietnamese are fighting in organized units in the South. See *Legality of United States Participation*, *supra* note 213, at 475. In June 1954 the United States sent a covert team headed by Colonel Edward G. Lansdale into North Vietnam to sabotage key facilities and to conduct psychological warfare. See Sheehan, *supra* note 40, at 15-18.

217. *Legality of United States Participation*, *supra* note 213, at 475. President Lyndon Johnson approved the offensive deployment of ground forces in April and July 1965. Sheehan, *supra* note 40, at 382, 402, 416.

218. U.N. CHARTER art. 2, para. 4 in *Legality of United States Participation*, *supra* note 213, at 475.

219. *Id.* at art. 51.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

nized principle of international law."²²⁰ The Charter does not limit this right to Member States.²²¹ In fact, the Charter encourages nonmembers, such as South Vietnam, to adhere to the provisions of the Charter, particularly in regards to the deployment of armed force. Article 2(6) states that "[t]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."²²² Depriving nonmembers of their inherent right of self-defense would not only contravene the principles of the United Nations, but also would be "prejudicial to the maintenance of peace."²²³

What of the fact that South Vietnam is not a sovereign State? May it still assert the right of collective self-defense? According to the memorandum, there is no question that one zone of a temporarily divided State may not be militarily attacked by the other zone.²²⁴ Such a prohibition, according to the memorandum, would have a destructive effect on the stability of international engagements such as the Geneva accords of 1954, and on internationally agreed lines of demarcation. The memorandum concludes that this only "would create new dangers to international peace and security."²²⁵

220. *Legality of United States Participation*, *supra* note 213, at 475.

221. While nonmembers such as South Vietnam have not formally assumed obligations under the United Nations Charter, the memorandum notes that much of the substantive law of the Charter has become part of the general law of nations through custom and usage. *Id.* This is particularly true of the Charter provisions pertaining to the use of force. *Id.* South Vietnam in its application for membership in the United Nations has expressed its willingness to abide by the Charter. *Id.* Thus, "it seems entirely appropriate to appraise the actions of South Viet-Nam in relation to the legal standards set forth in the United Nations Charter." *Id.* at 476 n.3.

222. U.N. CHARTER, art. 2, para. 6 in *Legality of United States Participation*, *supra* note 213, at 475.

223. *Id.* at 476.

224. *Id.* at 477. The memorandum observes that the Republic of Vietnam has been recognized as a separate international entity by approximately sixty governments. The Department of State notes that South Vietnam has been admitted as a member of a number of specialized United Nations agencies and, in 1957, the General Assembly voted to recommend South Vietnam for membership. Its admission was frustrated by the veto of the Soviet Union in the Security Council. *Id.*

225. *Id.* at 478. The right of collective self-defense, according to the memorandum, is not limited to members of regional arrangements. "Article 51 appears in chapter VII of the Charter entitled 'Actions With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.'" U.N. CHARTER art. 51, *quoted in Legality of United States Participation*, *supra* note 213, at 475. Chapter VIII is entitled "Regional Arrangements," and concerns the role of such organizations in the maintenance of international peace and security. *Id.* Chapter VIII begins with Article 52 which provides, in part:

(1) Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

(2) the Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of

May the United States exercise the right of collective self-defense under Article 51 for an entity which is a nonmember? The memorandum contended that nothing in the Charter precludes Member States, such as the United States, from responding to a request for armed assistance from a nonmember.²²⁶ The memorandum noted that critics will "search in vain for any . . . provision . . . that would preclude United States participation in the collective defense of a nonmember."²²⁷ The fact that Article 51 refers to an "armed attack" against a "Member of the United Nations," according to the Department of State, was not intended to preclude members from participating in the defense of nonmembers.²²⁸ The memorandum observed that a contrary interpretation "would have serious detrimental consequences for international peace and security and would be inconsistent with the purposes of the United Nations."²²⁹

The Department of State also pointed out that States' exercise of collective self-defense is not precluded by the fact that the United Nations Security Council is charged with overall responsibility for insuring the preservation of international peace and security.²³⁰ Article 51 permits States to exercise their right of collective self-defense "until the Security Council has taken measures necessary to maintain international peace and security."²³¹ Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not ". . . affect the authority and responsibility of the Security Council . . . to take at any time such action as it deems necessary . . . to maintain or restore international peace and security."²³² It is clear, according to the legal memorandum, that a victim of an armed assault is not required to passively absorb an attack and wait until the United Nations intervenes to restore the peace. The Charter specifically authorizes States to assert their right of individual and collective self-defense until such time as the Security Council acts to restore international

local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

(3) The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

U.N. CHARTER, art. 52, *quoted in Legality of United States Participation*, *supra* note 213, at 475.

226. *Id.* at 476.

227. *Id.* at 477.

228. *Id.*

229. *Id.*

230. U.N. CHARTER art. 52, *in Legality of United States Participation*, *supra* note 213, at 479.

231. U.N. CHARTER art. 51, *quoted in Legality of United States Participation*, *supra* note 213, at 479.

232. *Id.*

peace.²³³ The memorandum noted that the United States had satisfied this notification requirement and has reported to the Security Council on the measures it has taken to counter Communist aggression in Vietnam.²³⁴ The Council, however, has not taken action to restore peace and security in southeast Asia. In fact, the memorandum parenthetically observed that "members of the Council have been notably reluctant to proceed with any consideration of the Viet-Nam question."²³⁵

According to the legal memorandum, this is not an instance of United States imposing its will on a weak third world country. The North Vietnamese were contravening the Geneva Accords. The United States had pledged not to disturb the Geneva Accords and had declared that it would view any renewal of aggression in violation of the accords with grave concern.²³⁶ United States intervention in violation of the demilitarization provisions of the agreement reached at Geneva was justified by the "international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations."²³⁷

The memorandum also went on to note that the protocol of the SEATO Treaty extended protection to the South Vietnamese.²³⁸ Article IV(1) obligated the United States to meet armed aggression in accordance with its constitutional process. The Treaty does not require a collective determination that an armed attack has occurred as a precondition for military action under Article IV(1).²³⁹ In addition to these formal legal obligations to assist South Vietnam, the memorandum stressed that both Presidents Eisenhower and Kennedy

233. *Id.* at 479, n.8.

234. *Id.* at 479.

In August 1964 the United States asked the Council to consider the situation created by North Vietnamese attacks on United States destroyers in the Tonkin Gulf. The Council thereafter met to debate the question created by North Vietnamese attacks on United States destroyers in the Tonkin Gulf. The Council thereafter met to debate the question, but adopted no resolutions. Twice in February 1965 the United States sent additional reports to the Security Council on the conflict in Viet-Nam and on the additional measures taken by the United States in the collective defense of South Viet-Nam. In January 1966 the United States formally submitted the Viet-Nam question to the Security Council for its consideration and introduced a draft resolution calling for discussions looking towards a peaceful settlement on the basis of the Geneva accords.

Id.

235. *Legality of United States Participation*, *supra* note 213, at 479. The memorandum notes that the United States is not required under international law to formally issue a declaration of war prior to deploying armed force. *Id.* at 480.

236. *Id.* at 480.

237. *Id.* at 489.

238. *Id.* at 480.

239. *Legality of United States Participation*, *supra* note 213, at 481; see Dulles, *supra* note 89.

had declared that the United States would provide assistance to South Vietnam in its struggle against Communist subversion.²⁴⁰

The conditions in North Vietnam, according to the memorandum, also excused the South Vietnamese from entering into consultations concerning the conduct of elections. These elections were to provide for the free expression of the national will.²⁴¹ The Department of State parenthetically noted that South Vietnam had objected to the provisions of the Geneva Accords and the planned elections.²⁴² However, even accepting that South Vietnam was bound by the agreement reached at Geneva, the "conditions in North Vietnam . . . were such as to make impossible any free and meaningful expression of popular will."²⁴³ The Communists "were running a police state where executions, terror and torture were commonplace."²⁴⁴ The memorandum concluded that a nationwide election in these circumstances "would have been a travesty."²⁴⁵ No one in the North would have "dared to vote except as directed."²⁴⁶ Since a substantial majority of the populous lived north of the seventeenth parallel, an election "would have meant turning the country over to the Communists without regard to the will of the people."²⁴⁷

In conclusion, the legal memorandum briefly addressed the authority of the President to deploy United States troops abroad and to commit them to military actions. Specifically, may the President deploy American troops abroad absent a declaration of war? As Commander in Chief, according to the Department of State, the President possessed full constitutional authority to carry out military actions when deemed necessary to maintain the security and defense of the United States. The SEATO Treaty formally recognized that an armed attack against any of the Signatories or designated territories, such as South Vietnam, imperiled the peace and safety of each of the treaty members.²⁴⁸ A declaration of war, according to the Department of State, has never been the touchstone of constitutionality. The memorandum recited that since the Constitution was adopted, there had been at least 125 instances in which the President had ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization.²⁴⁹ Thus, it is clear, according to the memorandum, that the Constitution "leaves

240. *Legality of United States Participation*, *supra* note 213, at 482.

241. *Id.* at 483.

242. *Id.* at 483.

243. *Id.* at 483.

244. *Id.* at 484.

245. *Legality of United States Participation*, *supra* note 213, at 484.

246. *Id.*

247. *Id.*

248. *Id.* at 484.

249. *Id.* at 484.

to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting with Congress."²⁵⁰ It is not only the Executive Branch which has recognized that an armed attack against South Vietnam threatens the security of the United States. The SEATO Treaty was ratified by the Congress which was fully cognizant of the President's constitutional authority to commit troops where required to safeguard the national interest.²⁵¹

At any rate, according to the Department of State memorandum, Congress unmistakably approved and authorized United States military activity in Vietnam.²⁵² Following the North Vietnamese attacks in the Tonkin Gulf against United States destroyers, both the Senate and the House adopted a joint resolution approving and supporting "all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."²⁵³ The Department of State contended that section 2 of the Tonkin Gulf Resolution authorized the President, in his discretion, to militarily assist South-Vietnam. The Resolution proclaimed that the United States regards as "vital to its national interest and to world peace" the maintenance of international peace and security in Southeast Asia.²⁵⁴ Section 2 further provided that:

[T]he United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.²⁵⁵

250. *Legality of United States Participation*, *supra* note 213, at 485.

251. *Id.* at 485.

252. *Id.* at 485.

253. *Id.* at 485 quoting H.J. Res. 1145, Pub. L. No. 88-408, 78 Stat. 384 (1965) [hereinafter Tonkin Gulf Resolution]; see *supra* notes 147-48 and accompanying texts.

254. *Legality Of United States Participation*, *supra* note 213, at 486 quoting Tonkin Gulf Resolution, *supra* note 253.

255. Tonkin Gulf Resolution, *supra* note 253, quoted in *Legality of United States Participation*, *supra* note 213, at 486. The body of the resolution resolved as follows:

That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Section 2. The United States regards as vital to its national interest and to world peace and maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Section 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it

According to the Department of State:

Section 2 thus constitutes an authorization to the President, in his discretion, to act, using armed force, if he determines that this is required to assist South Vietnam at its request in defense of its freedom. The identification of South Viet-Nam through the reference to "protocol state" in this section is unmistakable and the grant of authority "as the President determines" is unequivocal.²⁵⁶

The legal memorandum went on to note that the Senate was aware that this language authorized the President to act in accordance with United States obligations under SEATO; and that the Senate recognized that the resolution set the stage for war.²⁵⁷

In sum, the Department of State's legal memorandum argued: that South Vietnam was being subjected to an armed attack by Communist North Vietnam; aggression was being carried out through the infiltration of armed personnel, military equipment, and regular combat units; South Vietnam and the United States were exercising their right of individual and collective self-defense against this armed attack; and the right of self-defense is not qualified by the fact that South Vietnam is a zone of a temporarily divided State and is not a member of the United Nations.²⁵⁸

The memorandum also pointed out that the United States was not only acting at the request of South Vietnam, but had committed to the collective defense of South Vietnam in the SEATO Treaty.²⁵⁹ The memorandum further noted that the United States had intervened to deter additional North Vietnamese violations of the Geneva accords. These violations, according to the memorandum, justified the United States suspension of the prohibition against the introduction of foreign troops into South Vietnam. The argument that North Vietnam's aggression was justified by South Vietnam's failure to enter into negotiations concerning the conducting of elections, in the view of the Department of State, overlooks the fact that repressive conditions in the North made free and fair elections impossible.²⁶⁰

The legal memorandum further argued that the President possessed full constitutional authority to commit United States troops to the collective defense of South Vietnam. The Department of State noted that this authority does not rest solely upon the Constitution.

may be terminated earlier by concurrent resolution of the Congress.
Tonkin Gulf Resolution, *supra* note 253 (1964).

256. *Legality of United States Participation*, *supra* note 213, at 486.

257. *Id.* at 487 (citing and quoting 110 CONG. REC. 18409 (1964) (exchange between Senators John Sherman Cooper and William Fulbright)).

258. *Id.* at 488.

259. *Id.* at 488-89.

260. *Id.* at 489.

Instead, the SEATO Treaty, which was adopted by the Senate, obligated the United States to defend South Vietnam against armed attack. Congress also explicitly approved the President's deployment of armed force when it passed the Tonkin Gulf Resolution. The President's inherent constitutional authority as commander in chief, together with the provisions of the SEATO Treaty and the Tonkin Gulf Resolution, solidified justification for the commitment and use of United States military forces in South Vietnam.²⁶¹

In a speech at the University of Pittsburgh Law School, Legal Adviser Leonard C. Meeker suggested that the importance of the conflict in Vietnam transcended the containment of Communism. According to Meeker, a failure by the United States to defend South Vietnam would weaken the norms against aggression and "gravely impair the effectiveness of the international law that we have today."²⁶²

For one thing, withdrawal and abandonment of South Vietnam would be to sacrifice the Geneva accords and advertise for all to see that an international agreement can with impunity be treated by an aggressor as a mere scrap of paper. Moreover, withdrawal and abandonment of South Vietnam would undermine the faith of other countries in United States defense treaty commitments and would encourage would-be aggressors to suppose they could successfully and even freely impose on their weaker neighbors by force.²⁶³

C. *The Lawyers' Committee Replies*

An *ad hoc* group which called itself the Lawyers' Committee On American Policy Toward Vietnam issued two memoranda critical of the State Department's legal analysis.²⁶⁴ In a letter dated January 25, 1966, to President Johnson, the co-chairs of the Lawyers Committee summarized the Committee's argument:

[O]ur committee has reached the regrettable but inescapable conclusion that the actions of the United States in Vietnam contravene the essential provisions of the United Nations Charter, to which we are bound by treaty; violate the Geneva Accords, which we pledged to observe; are not sanctioned by the treaty creating the Southeast Asia Treaty Organization; and violate our own Constitution and the system of checks and balances which is the heart of it, by the prosecution of the war in Viet-

261. *Id.* at 489.

262. Meeker, *Viet-Nam and the International Law of Self-defense*, DEPT. ST. BULL., Jan. 9, 1967, at 54, 62.

263. *Id.* at 62.

264. See generally Lawyers Committee I-III, *supra* note 180.

nam without a congressional declaration of war.

[T]he Geneva accords recognized all of Vietnam as a single state. The conflict in Vietnam is a civil strife and foreign intervention is forbidden. We do well to recall that President Lincoln, in the course of our Civil War to preserve the union of the North and the South, vigorously opposed British and French threats to intervene in behalf of the independence of the Confederacy.²⁶⁵

The Committee initially noted that the observance of the rule of law is a basic tenet of American Democracy. As a result, the brief explained that it is "fitting" that American lawyers examine the policies pursued by the United States government to determine whether its conduct is justified under the "rule of law mandated by the United Nations Charter, a charter adopted to banish from the earth the scourge of war."²⁶⁶

The Committee's foundation brief initially addressed the legality of United States policy in Vietnam under the United Nations Charter. The Committee noted that the United Nations Charter requires that Member States refrain from the "'threat or use of force against the territorial integrity or political independence of any state.'"²⁶⁷ It is the Security Council which is to determine the "'existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or shall decide what measures shall be taken . . . to maintain or restore international peace and security.'"²⁶⁸

The Committee noted that Article 51's provision for the use of armed force in self-defense is the single authorization for States to unilaterally resort to military force.²⁶⁹ The Committee argued that Article 51 is a narrow exception to the prohibition on unilateral force²⁷⁰ and contended that an act of self-defense only may be undertaken pursuant to Article 51 in response to a particularly grave,

265. 112 CONG. REC. 2665-66 (Letter of January 25, 1966 from Robert W. Kenny & William L. Standard).

266. Lawyers Committee I, *supra* note 180, at 2666.

267. *Id.* at 26667 quoting U.N. CHARTER, art. 2, para. 4.

268. *Id.* quoting U.N. CHARTER, art. 39.

269. *Id.* at 26667.

270. *Id.* at 2667.

In expressly limiting independent military action to instances of armed attack, the founding nations explicitly and implicitly rejected the right to the use of force based on the familiar claim of "anticipatory self-defense," or "intervention by subversion," or "pre-emptive armed attack to forestall threatened aggression," and similar rationale. Such concepts were well known to the founding nations if only because most of the wars of history had been fought under banners carrying or suggesting these slogans. More importantly for our purposes here, however, the United States was aware of these precepts before the Senate ratified the United Nations Charter and consciously acquiesced in their rejection as a basis for independent armed intervention.

Id.

immediate emergency. Thus, there is no basis for the proposition that the gradual infiltration of North Vietnamese military and non-military personnel in support of the Viet Cong insurgency may be regarded as an "armed attack" under Article 51.²⁷¹ The Vietnam conflict, according to the Lawyers Committee, is governed by Article 33(1) of the United Nations Charter. This provision requires the parties to a dispute which is likely to endanger the maintenance of international peace and security to seek a solution by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or other peaceful means of their own choice."²⁷²

In any event, the Lawyers Committee asserted that an act of self-defense under Article 51 must be proportionate to the provocation. Acts such as the bombing of North Vietnam clearly are excessive when compared to the infiltration of troops and support personnel.²⁷³ Article 51 addresses the inherent right of individual or collective self-defense of Members of the United Nations. South Vietnam, however, is a temporary zone and does not qualify as a Member State within the meaning of the United Nations Charter. This does not mean that a remedy is unavailable. The Security Council is the proper forum for the resolution of such a "threat to the peace, breach of the peace, or act of aggression."²⁷⁴ The Lawyers Committee argued that the United States cannot justify its intervention into South Vietnam on the basis of Article 51 for an additional reason. The Committee contended that Article 51 presupposes that States invoking their inherent right of collective self-defense are members of a regional collective defense organization within the purview of the United Nations Charter. Their memoranda noted that Articles 51 and 53, which address regional systems, are interrelated provisions which were intended to integrate and coordinate the United Nations peacekeeping apparatus with regional organizations such as the Inter-American system.²⁷⁵ According to the Lawyers Committee,

271. Lawyers Committee II, *supra* note 180, at A5802. The Committee also parenthetically notes that the infiltration of North Vietnamese was a response to the increasing American military presence in South Vietnam. *Id.* The Lawyers Committee distinguished between an armed attack and indirect aggression. *Id.* at 5801.

272. *Id.* at 5802 *citing* U.N. CHARTER art. 33, para. 1. The U.N. Charter takes precedence over other international agreements. Article 103 provides that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

273. Lawyers Committee II, *supra* note 180, at A5802. The Lawyers Committee points out that neither Germany under Hitler nor Italy under Mussolini claimed that their intervention in the Spanish Civil War on behalf of Franco would have justified the use of military force against the Soviet Union which intervened on behalf of the Spanish loyalists. *Id.*

274. Lawyers Committee I, *supra* note 180, at 2667 *quoting* U.N. CHARTER art. 39.

275. *Id.* at 2668 *quoting* U.N. CHARTER art. 53. Article 53(1) provides that:

(1) The Security Council shall, where appropriate, utilize such regional ar-

the geographically disparate Southeast Asia Treaty Organization does not qualify as a regional organization within the terms of the United Nations Charter:

The concept that the United States—a country separated by oceans and thousands of miles from southeast Asia and bereft of any historical or ethnic connection with the peoples of southeast Asia—could validly be considered a member of a regional system implanted in southeast Asia is utterly alien to the regional systems envisaged in the Charter. The “Southeast Asia Collective Defense Treaty”—connecting the United States with southeast Asia, architected by Secretary of State Dulles, is a legalistic artificial formulation to circumvent the fundamental limitations placed by the United Nations Charter on unilateral actions by individual members SEATO is a caricature of the genuine regional systems envisaged by the United Nations Charter. A buffalo cannot be transformed into a giraffe however elongated its neck may be stretched. The Dulles approach to collective defense treaties employed legal artifice to circumvent the exclusive authority vested in the United Nations to deal with breaches in the peace.²⁷⁶

In sum, the Lawyers’ Committee concluded that it is “difficult to escape the conclusion . . . that the action of the United States Government in Vietnam contravenes essential provisions of the United Nations Charter The failure of the United States to honor its obligations under the United Nations Charter is a regrettable but inescapable conclusion which we, as lawyers, have been compelled to reach.”²⁷⁷

The Lawyers’ Committee also argued that the Geneva Accords did not provide a basis for United States intervention. The division of Vietnam at the seventeenth parallel, according to the Lawyers’ Committee, was intended to be a temporary step in preparation for a general national election to form a unified nation. The division was part of an armistice agreement and was not intended to be a political or territorial boundary. The historic reality is that Vietnam is a single country. An election was to be held “not to determine whether North and South Vietnam should be united, but to select a govern-

rangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council

Id.

U.N. CHARTER art 53, para. 1. Article 54 provides that:

the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

U.N. CHARTER, art. 54.

276. Lawyers Committee I, *supra* note 180, at 2668.

277. *Id.* at 2669.

ment of the nation of Vietnam, constituting all of Vietnam--north, south, east, and west."²⁷⁸

The United States pledged it would refrain from the threat or use of force to disturb the Geneva Accords.²⁷⁹ The American Government also stated that in the case of "nations now divided against their will, we shall continue to seek to achieve unity through elections supervised by the United Nations to insure that they are conducted fairly."²⁸⁰ The Lawyers' Committee concluded that the United States, by endorsing the Accords, had recognized the fact that Vietnam was a single nation. Nevertheless, "the United States persists in its denial that it is intervening in a civil war. It seeks to justify the bombing of North Vietnam by the United States on the basis that North Vietnam is a foreign aggressor in South Vietnam."²⁸¹

The Lawyers' Committee thus concluded that the United States was in violation of the Geneva Accords. It has contravened the agreement by sending troops into Vietnam, supporting the South's refusal to conduct elections and by attempting to transform South Vietnam into a separate state.²⁸² Even if North and South Vietnam are considered to be separate entities or countries, the United States may not respond by bombing the North.²⁸³

It is sobering to realize that if the United States was lawfully entitled to bomb North Vietnam in response to North Vietnam's intervention in the Southern civil war, then North Vietnam or any of its allies would have been lawfully entitled to bomb the United States in response to the United States much more massive intervention in that civil war.²⁸⁴

The Committee also argued that the United States military presence in Vietnam could not be justified under the SEATO Treaty. Article IV(1) permits the use of force by a Signatory State in the event of "aggression by means of armed attack."²⁸⁵ In cases in which

278. *Id.*

279. *Id.* at 2670, quoting United States Declaration, *supra* note 83.

280. *Id.*, citing United States Declaration, *supra* note 82.

281. *Id.* The Lawyers Committee notes that President Eisenhower, in his memoirs, suggests that Ho Chi Minh would have emerged victorious in an electoral contest:

I have never talked or corresponded with a person knowledgeable in Indo Chinese affairs who did not agree that had elections been held at the time of the fighting possibly 60 percent of the population would have voted for the Communist Ho Chi Minh as their leader rather than Chief of State Bao Dai.

DWIGHT D. EISENHOWER, MANDATE FOR CHANGE: THE WHITE HOUSE YEARS, 1953-1956, 372 (1963), quoted in Lawyers Committee I, *supra* note 180, at 2670.

282. *Id.*

283. Lawyers Committee II, *supra* note 180, at A5802.

284. *Id.*

285. Lawyers Committee I, *supra* note 180, at 2670, quoting SEATO TREATY, *supra* note 94, art. IV, para. 1.

the integrity or inviolability of any territory covered by the Treaty is threatened by "other than armed attack," or by any situation which might "endanger the peace of the area," Article IV(2) requires that Signatories "consult immediately in order to agree on the measures to be taken."²⁸⁶ The Lawyers' Committee argued that the civil war in Vietnam clearly fell within paragraph 2. However, SEATO had not endorsed the United States military action in Vietnam. Even if SEATO had agreed on a course of joint action, the Lawyers' Committee noted that regional organizations would have been required to obtain United Nations approval prior to engaging in any "enforcement action."²⁸⁷

The Lawyers' Committee concluded by contending that American intervention in Vietnam also is violative of the United States Constitution. They pointed out that the power to make and conduct foreign policy is not vested exclusively in the President. Such authority is divided between the President and Congress, with "each endowed with complementary, but separate powers and responsibilities."²⁸⁸ In those instances in which diplomacy fails and there is a need to resort to armed force, the President is constricted by the fact that the power to declare war is vested in Congress. "Under Article I, Section 8, Clause II, that power is confided exclusively to the Congress Under the Constitution, Congress alone must make this decision. The Clause does not read 'on recommendation of the President,' nor that the 'President with advice and consent of Congress may declare war.'"²⁸⁹ According to the Lawyers Committee, the repelling of a "sudden attack" is the only instance in which the President may unilaterally deploy armed force without a declaration of war.²⁹⁰ The limitations on the President's powers to conduct foreign policy and to declare war, in the view of the Committee, reflects a "profound distrust of executive authority and a corresponding reliance upon the legislature as the instrument for the decisionmaking in this vital area."²⁹¹

The Lawyers' Committee conceded that there are many instances in which the President had sent American armed forces abroad without a declaration of war. However, the Committee pointed out, that for the most part, these were minor skirmishes or police actions.²⁹²

None of the incidents, except possibly the Korean conflict, in-

286. *Id.*, quoting SEATO TREATY, *supra* note 94, art. IV, para. 2.

287. *Id.*, quoting U.N. CHARTER, *supra* note 218, art. 53(1). See *supra* note 275.

288. *Id.* at 2671.

289. Lawyers Committee I, *supra* note 180, at 2671.

290. *Id.*

291. *Id.* at 2672.

292. *Id.*

volves United States war actions comparable in magnitude to those in Vietnam. None involved the dispatch of military force for combat to a territory from which, by solemn international compact, foreign military personnel, foreign equipment and foreign bases were to be excluded. Moreover, most of these instances were the product of "gunboat diplomacy" undertaken before the United Nations Charter limited the permissible use of force under international law to self-defense against armed attack.²⁹³

According to the Lawyers' Committee, the Tonkin Gulf Resolution did not constitute a congressional declaration of war. At most, it approved and supported the determination of the President, as Commander in Chief, to take all necessary measures to repel an armed attack against the United States. The Lawyers' Committee conceded that the Tonkin Gulf Resolution recognized that the maintenance of international peace and security in Southeast Asia was vital to the national interest of the United States and declared that the United States was ready to take all necessary steps, including the use of armed forces, to assist any member or protocol SEATO State to defend their freedom. The Committee, however, stressed that the Tonkin Gulf Resolution stipulated that all such steps should be consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under Southeast Asia Collective Defense Treaty.²⁹⁴ The Committee also observed that Congress' appropriation of funds for operations in Vietnam also did not serve as a substitute for a declaration of war.²⁹⁵

The pledges offered by Presidents Eisenhower and Kennedy to assist South Vietnam also afforded no justification for United States intervention in Vietnam. These pledges were not ratified by Congress and did not possess the status of treaties. These pledges also were ambiguous and did not clearly commit the United States to militarily intervene to defend South Vietnam against internal or external aggression.²⁹⁶ The Lawyers' Committee noted that it was "strange legal logic retrospectively to construe these carefully guarded offers of limited assistance as commitments for military intervention."²⁹⁷ The Committee also observed that South Vietnam is financially and militarily dependent on the United States. It queried, "[i]n what sense, then, is such a regime sufficiently constituted as a government to authorize military intervention of the United States on its

293. Lawyers Committee II, *supra* note 180, at A5803.

294. Lawyers Committee I, *supra* note 180, at 2672.

295. *Id.*

296. *Id.* at 2669.

297. Lawyers Committee II, *supra* note 180, at A5803.

behalf?"²⁹⁸

The Committee pointed out that the contention that the President may commit United States forces abroad absent a declaration of war is a dangerous abrogation of executive power which is violative of the separation of powers. It noted that "[i]f the Constitution has such elastic, evanescent character . . . presidentially determined expediency would become . . . the standard of constitutional construction."²⁹⁹ At any rate, the Lawyers' Committee observed that even a congressional declaration of war cannot override the requirements of international law and treaties.³⁰⁰

Since United States actions in South Vietnam violate treaties to which the United States has become a party by ratification pursuant to the Constitution, they violate the Supreme Law of the Land. No branch of the Government, alone or together, may under the Constitution, authorize actions in violation of treaties or delegate power to do so. There is no constitutional authority to violate the Charter of the United Nations, a treaty of which the United States was a principal architect, which embodies the conscience of mankind, and which is legally binding on all its members.³⁰¹

In conclusion, the Lawyers' Committee called for the unconditional termination of the bombing of North Vietnam and for the cessation of military operations in South Vietnam. The Committee advocated the unconditional recognition of the National Liberation Front and the initiation of negotiations based on the principles embodied in the Geneva Accords of 1954.³⁰²

D. Summary

The memoranda drafted by the Department of State and the Lawyers' Committee were adversarial documents. The legal arguments reflect differing perceptions of the wisdom of United States involvement in Vietnam and are based upon divergent views concerning the nature of United States foreign policy.³⁰³

The Department of State legal memorandum is based on the premise that Hanoi fomented and organized the revolt in South Vietnam and has supplied and augmented the NLF.³⁰⁴ It is doubtful whether this scenario of "aggression from the North," adequately

298. *Id.* at 5802.

299. Lawyers Committee II, *supra* note 180, at 2672.

300. *Id.* at 2673.

301. Lawyers Committee II, *supra* note 180, at A5803.

302. *Id.* at A5804.

303. See generally Richard A. Falk, *International Law And The United States Role In The Viet Nam War*, 75 YALE L.J. 1122, 1133-34 (1966).

304. See *supra* notes 193-212 and accompanying texts.

captured the complex reality of the Vietnam problem."³⁰⁵ This interventionist model possessed the virtue of greatly simplifying the task of legally justifying United States policy. United States intervention could rather easily be portrayed as an exercise of collective self-defense under the United Nations Charter³⁰⁶ and as an expression of the United States obligation to defend a country or territory which is accorded protection under the SEATO Treaty.³⁰⁷

Hanoi, of course, claimed that its infiltration of troops was justified by the failure of Saigon to enter into consultations concerning the conduct of national elections. The Department of State, however, pointed out that Saigon's resistance to elections was based on repressive conditions in the North which made it impossible to guarantee that an election would permit the expression of popular sentiments.³⁰⁸ North Vietnam's contravention of the Geneva Accords' prohibition on the use of either zone for the resumption of hostilities or the furtherance of an aggressive policy was characterized by the Department of State as a material breach of the Geneva Agreement which justified the United States' suspension of the demilitarization provisions of the agreement reached at Geneva.³⁰⁹

Professor John Norton Moore elaborated on the contention that Saigon's failure to enter into negotiations concerning the conduct of elections did not constitute a material breach which justified Hanoi's invasion of South Vietnam.³¹⁰ According to Professor Moore, the partition of Vietnam was the core provision of the Geneva settlement which affirmed the separate *de facto* status of the two territories.³¹¹ He pointed out that the Geneva settlement was largely devoted to the provisions for a cease-fire and to the transfer of populations between zones and to the maintenance of troop limitations.³¹² Moore argued that the Western Powers did not expect Vietnam to be united and, as a result, little attention was devoted to the conduction and organization of elections.³¹³ The purpose of the partition, in Professor Moore's view, was to provide a democratic alternative for those Vietnamese who wished to live under a Communist regime.³¹⁴

The Department of State's legal memorandum concluded by finding constitutional support for the President's authority to commit

305. John N. Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051, 1053 (1967).

306. See *supra* notes 213-37 and accompanying text.

307. *Supra* note 238-40 and accompanying text.

308. *Supra* notes 241-47 and accompanying text.

309. See *supra* note 237 and accompanying text.

310. Moore, *supra* note 305, at 1055-66.

311. *Id.* at 1065.

312. *Id.* at 1062.

313. *Id.* at 1061-62.

314. *Id.* at 1062.

troops abroad in the President's inherent authority as commander in chief,³¹⁵ and in the language of the SEATO Treaty³¹⁶ and the Tonkin Gulf Resolution.³¹⁷

The United States position is clear and uncomplicated. It rests on the factual assertion that Hanoi organized, launched and continued to orchestrate an unjustified offensive against South Vietnam. North Vietnam's armed attack across an internationally recognized cease-fire line was a violation of the territorial integrity of South Vietnam and was in defiance of the international norm against the unilateral exercise of armed force. The United States military intervention thus was a justifiable act of collective self-defense designed to halt Hanoi's aggression.

A significant problem with this intervention model is that it assumed that the unrest in the South was completely orchestrated and organized by North Vietnam.³¹⁸ John Norton Moore refined the State Department's position and argued that Hanoi initially assisted and gradually gained control over the NLF and indigenous rebellion in the South.³¹⁹ Professor Moore argued that the North Vietnamese gradually took organizational control of the rebellion in the South. By 1965, North Vietnamese troops had assumed responsibility for most of the fighting in South Vietnam.³²⁰ Moore concluded that North Vietnam "is not simply assisting in a struggle for 'internal control' of the South, but is substantially tied up with the military and political leadership of the insurgency in the South and has as a major, although possibly long term objective; unification with the South."³²¹

The Lawyers' Committee, in contrast to the Department of State, viewed Vietnam as an internal, civil war for control of the southern zone. According to the Lawyers' Committee, the NLF initially launched an internal rebellion, and Hanoi gradually extended increasing assistance to the NLF to counter the United States' expanding military intervention.³²² Quincy Wright, a leading figure in the Lawyers' Committee on American Policy Toward Vietnam, argued that the United States' portrayal of Vietnam as a war of aggression overlooked that the conflict in Vietnam was an extension of the historic struggle to unify Vietnam and compared Ho Chi Minh to Abraham Lincoln.³²³

315. See *supra* notes 248-50 and accompanying text.

316. See *supra* notes 241, 251, and 257 and accompanying text.

317. See *supra* notes 252-56 and accompanying text.

318. See *supra* notes 193-203 and 209-10 and accompanying text.

319. Moore, *supra* note 305, at 1070-73.

320. *Id.* at 1073.

321. *Id.* at 1075.

322. See generally *supra* notes 271, 273 and 281 and accompanying text.

323. Quincy Wright, *Legal Aspects Of The Viet-Nam Situation*, 60 AM. J. INT'L L. 750,

The issue of civil strife in America in 1861 and in Viet-Nam in 1965 was whether the Declaration of Independence of the United States of July 4, 1776, and the Declaration of Independence of the Democratic Republic of Viet-Nam of September 2, 1945, closely resembling it, contemplated in each case a unified state as held by Lincoln and Ho Ch Minh, or permitted secession as held by Jefferson Davis and Diem [T]he position of Ho in regard to the legal unity of Viet-Nam is similar to that of Lincoln in regard to the United States and the position of the United States in Viet-Nam is similar to that which Great Britain would have had if it had intervened in behalf of the Confederacy as it threatened to do in 1861, giving rise to diplomatic notes by Secretary of State Seward and a resolution by Congress indicating that such a move would be an unfriendly act.³²⁴

Hanoi's gradual infiltration of arms, supplies, technical personnel and of troops largely comprised of former southerners, in the view of the Lawyers' Committee,³²⁵ did not constitute an "armed attack" under the United Nations Charter³²⁶ or SEATO Treaty.³²⁷ The United States, thus, may not legally claim that it was engaged in an act of collective self-defense.³²⁸ Such a claim would be paradoxical in light of the fact that it was the flaunting of the Geneva Accords by South Vietnam and the United States which provoked the NLF and later motivated Hanoi to engage in an armed rebellion.³²⁹ Quincy Wright observed that South Vietnam's refusal to enter into consultations concerning the conduct of elections was particularly provocative.³³⁰

There can be little doubt but that Ho Chi Minh regarded the Geneva resolutions as part of the settlement to which he agreed. Military unification of Viet-Nam was within his grasp after the defeat of France at Dien Bien Phu if external aggression, especially by the United States, could be avoided. It is incredible that he would have agreed to the cease-fire, even though he desired it, in the hope that it would prevent such intervention, unless he was convinced that unification would shortly be effected by the peaceful method of elections. A study of the diplomacy at Geneva suggests that the principal Powers except the United States were more interested in peace than in ideologies,

767 (1966).

324. *Id.* at 763-64.

325. *Supra* note 276 and accompanying text.

326. *Supra* notes 269-74 and accompanying text.

327. *Supra* notes 285-87 and accompanying text.

328. *See supra* notes 275-76 and accompanying text.

329. *See generally supra* notes 278-82 and accompanying text.

330. Wright, *supra* note 323, at 759-61. Wright argues that the North Vietnamese militia did not cross the cease-fire line until after United States bombing attacks were initiated in February 1965. Wright, *supra* note 327, at 766.

and recognized that the political provisions of the settlement, which would probably result in a national Communist Viet-Nam, were the price of peace, and were therefore no less important than the military provisions.³³¹

Wright went on to argue that South Vietnam's failure to enter into consultations concerning the conduct of elections to unify Vietnam suspended Ho Chi Minh's obligation to respect the cease-fire and authorized Ho to continue his "long effort" to unify Viet-Nam by force.³³²

Critics of the war either viewed Vietnam as a civil war between competing southern factions, both of whom enlisted outside support,³³³ or as a resumption of the historic conflict between factions based in Hanoi and in Saigon.³³⁴ Scholars also differed as to the right of outside powers, such as the United States, to intervene in such a civil war.³³⁵ The Lawyers' Committee adopted the position that the United States unilateral intervention in a civil war between southern factions "contravenes not only the Geneva Accords but also the general undertaking, fundamental in international law, that one state has no right to intervene in the internal affairs of another."³³⁶ The Lawyers' Committee noted that if that the United States was entitled under international law to intervene in civil war, then "North Vietnam's much smaller amount of aid to the southern insurgents would then be equally justified, and could not constitute indirect aggression, much less 'armed attack.' The entire justification for United States intervention would collapse."³³⁷ The United States' intervention into Vietnam, in the view of the Lawyers' Committee, created a dangerous precedent which could lead to counter-intervention by other major powers and the expansion of domestic conflicts into major international confrontations. The State Department's argument that North Vietnam's involvement in the South constituted an "armed attack" would "permit any country in the future to bomb and defoliate any other country intervening in a civil war by characterizing the latter's intervention as 'armed attack.' . . . [T]he State Department Memorandum conjures up arguments capable of leading to unpredictably ominous developments destructive of the world legal

331. *Id.* at 760.

332. Wright, *supra* note 323, at 760.

333. See Richard A. Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1109-58 (1967).

334. See Wright, *supra* note 323, at 763-64.

335. See generally Thomas Farer, *Intervention IN Civil Wars: A Modest Proposal*, 67 COLUM. L. REV. 266 (1967). See also Richard A. Falk, *The International Regulation Of Internal Violence In The Developing Countries*, 60 AM. SOC'Y INT'L L. PROC. 58 (1966).

336. Lawyers Committee III, *supra* note 180, at 73.

337. *Id.* at 72.

order."³³⁸

The United States, in the view of many critics of American policy in Vietnam, had blurred the distinction between international and civil wars. Opponents of the war argued that America had portrayed an internal subversion as an "armed attack" to justify intervention under Article 51 of the United Nations Charter.³³⁹ The United States' reliance on Article IV(2) of the SEATO Treaty was an egregious example of unilateral military intervention being portrayed as collective regional action.³⁴⁰ Professor Wolfgang Friedmann of Columbia concluded that the United States had endeavored to "disguise . . . legal anarchy by the invocation of formulae that merely cloak the nakedness of the political and ideological struggle."³⁴¹

Professor John Norton Moore dismissed the attacks on the legality of United States policy in Vietnam as "pseudo-scholarship" which rigidly interpreted international law "as if it were a municipal traffic ordinance."³⁴² Technical arguments concerning the constituent elements of an "armed attack" should not divert attention from the fundamental reality. The United States, in Professor Moore's view, was intervening in Vietnam to uphold the United Nations Charter which prohibits reliance upon armed force as a mechanism for change in international affairs. Moore emphasized that "[p]olitical disputes, black, white, or grey, provide no justification for major resort to force. There is a South Viet-Nam and its neighbors must learn to live in peace with it."³⁴³ The American judiciary soon found itself confronted with the challenge of evaluating the merits of these various arguments and determining the legality of United States intervention into Vietnam.

E. United States Intervention Into Vietnam And the American Judiciary

The United States judiciary circumvented their responsibility to

338. *Id.* at 73. Some argue that States are permitted to intervene in a civil war and are required to limit their military activity to the site of the territorial conflict. See Richard A. Falk, *International Law And the United States Role In The Viet Nam War*, 75 YALE L.J. 1122, 1123 (1966).

339. See generally Wolfgang Friedmann, *Law And Politics In The Vietnamese War: A Comment*, 61 AM. J. INT'L L. 776, 782-83 (1967) [hereinafter Friedman]. This, of course, was premised on the view that so-called wars of national liberation are a product of an international Communist movement that is intent on undermining Western democracies. *Id.* at 782.

340. *Id.* at 784.

341. *Id.* at 785. On the lack of effectiveness of Article 51 of the U.N. Charter, see generally Thomas Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing The Use Of Force By States*, 64 AM. J. INT'L L. 809 (1970).

342. John N. Moore, *Law And Politics In The Vietnamese War: A Response To Professor Friedmann*, 61 AM. J. INT'L L. 1039, 1053 (1967).

343. *Id.* at 1053.

determine the international legality of the Vietnam War, claiming that plaintiffs lacked standing to challenge the constitutionality of the war and that the legal justification of the conflict constituted a political question. As a result, there was no definitive determination as to the constitutional status of the War and the legality of the struggle remained a subject of continuing debate.³⁴⁴

The judiciary proclaimed that it was moving prudently into the area of foreign affairs and cautioned that "principled forbearance" is the "touchstone of a wise judicial policy."³⁴⁵ Courts observed that such restraint was consistent with democratic principles. It was noted that judges "serve democracy best by leaving the principal issues confronting the citizenry for decision to the political branches of government. The law was not intended nor is it suited to be a mere substitute for politics."³⁴⁶

[T]o fight out questions concerning the wise use of executive authority in the forum of public opinion rather than to transform such a contest to the judicial arena would more appropriately serve to vindicate the confidence and conviction of a democratic society without, at the same time, placing in jeopardy the balance envisioned by the separation of powers concept and adopted by our federal system.

The great power wielded by federal courts brings them close to the most sensitive areas of public affairs. As appeals from executive decisions or legislative actions become more frequent, judicial self-restraint looms ever more important. Otherwise, we shall begin to enter political domains far outside our competence and legitimate concern.³⁴⁷

In a series of cases, courts rejected the standing of individuals to challenge the legality of the Vietnam War. The Second Circuit Court of Appeals refused to enjoin the government from sending an enlisted army private to Fort Dix, New Jersey—a final posting for soldiers who were to be sent to Vietnam. The plaintiff contended that the United States Government was exceeding its powers in ordering him to fight in an undeclared and illegal war.³⁴⁸ The Court explained that only individuals actually ordered to report to Vietnam possessed standing to contest the legality of the war.³⁴⁹ The Ninth Circuit based their rejection of the standing of members of the United

344. See Robert P. Sugarman, *Judicial Decisions Concerning The Constitutionality Of United States Military Activity in Indo-China: A Bibliography Of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470 (1974).

345. *Atlee v. Laird*, 347 F. Supp. 689, 708 (E.D. Pa. 1973), *aff'd without opinion sub nom.*, *Atlee v. Richardson*, 411 U.S. 911 (1973).

346. *Id.* at 707-08.

347. *Id.* at 708.

348. *Berk v. Laird*, 429 F.2d 302, 304 (2d Cir. 1970).

349. *Id.* at 306.

States Air Force and Army Reserves based upon a similar rationale.³⁵⁰ The Ninth Circuit noted that the plaintiffs had not yet received orders to report for duty in Indochina and that, as a result, "neither actual nor threatened injury is alleged."³⁵¹ As a result, the plaintiffs had failed to allege a personal stake and interest sufficient to avoid the prohibition against employing the federal courts as a forum to air generalized grievances.³⁵² District Court Judge William T. Sweigert criticized the judiciary's denial of standing to those in the military and in the reserves:

To say that these . . . plaintiffs must wait until they are called up, perhaps suddenly, and ordered to the Vietnam area, perhaps quickly, and then file a court suit for a declaration of their legal rights, perhaps with too little time to properly do so, borders, we think, on the absurd.³⁵³

Those refusing induction into the military also were unsuccessful in challenging the war. The Sixth Circuit denied standing to a defendant who refused induction into the armed forces based upon their belief that they were being conscripted to fight in an illegal war.³⁵⁴ The Court explained that the defendant's challenge was "premature" and that he thus lacked standing to raise the illegality of the war as a defense to a violation of the Selective Service Act.³⁵⁵ Judge Harry Phillips explained that if the defendant "had obeyed the order to be inducted, he might never have been assigned to Vietnam and might never have been exposed to the situations of which he complains."³⁵⁶ *United States v. Sisson*³⁵⁷ was one of the few cases which recognized the standing of an individual who refused conscription to challenge the legality of the Vietnam War. District Court Judge Charles Wzanski argued that the judiciary's refusal to grant standing to those already in the military had insulated the govern-

350. *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd*, 464 F.2d 178, 179, 181-83 (9th Cir. 1972).

351. *Id.* at 181.

352. *Id.*

353. 318 F. Supp. at 547 n.12.

354. *United States v. Owens*, 415 F.2d 1308 (6th Cir. 1969), *cert. denied*, 397 U.S. 997 (1970).

355. *Id.* at 1313.

356. *Id.* See also *United States v. Valentine*, 288 F. Supp. 957, 984 (D.P.R. 1968). Taxpayers also lack standing to challenge the legality of the Indo-Chinese War. See *Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). Finally, the Second Circuit rejected the standing of Congresswomen Elizabeth Holtzman to challenge the American military incursion into Cambodia. *Holtzman v. Richardson*, 361 F. Supp. 544 (E.D.N.Y. 1973), *rev'd sub nom.*, *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). The Court noted that Congresswomen Holtzman "has not been denied any right to vote on Cambodia by any action of the defendants. She has fully participated in the congressional debates . . . [T]he fact that her vote was ineffective was due to the contrary votes of her colleagues and not the defendants herein." *Id.*

357. *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968), *appeal on other grounds dismissed*, 396 U.S. 1035 (1970).

ment's prosecution of the war from legal accountability.³⁵⁸ Judge Wzanski went on to argue that "if there is to be a presently effective judicial review it must come at the point of induction and not later."³⁵⁹

Courts also refused to rule on the legality of the Vietnam War on the grounds that this constituted a political question.³⁶⁰ In *Luftig v. McNamara*,³⁶¹ the United States Court of Appeals for the District of Columbia in a per curiam decision refused to rule on the justifiability of the Vietnam War. The Court explained that the deployment of armed force outside the borders of the United States was the exclusive constitutional preserve of the Presidency and Congress.³⁶²

It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.³⁶³

358. *Id.* at 512-13.

359. *Id.* at 513. *See also* *Atlee v. Laird*, 339 F. Supp. 1347, 1356 (E.D. Pa. 1972) (recognizes standing of taxpayers to challenge the legality of the war).

There are few citizens who could be so callous as to be unmoved by the almost daily reports in the media of the death and destruction being caused by this war The blood of these men provides a sufficient "conversational" interest on the part of every citizen in saving the human resources of this nation.

The fact that our nation is at war also necessarily causes some threat to the personal safety and security of all the citizens, given the complexity of international relations and the advanced means of war that have been developed through technology. Finally, plaintiffs have alleged that the expenditure of billions of dollars on the war has resulted in there being less funds available to be expended on urgent domestic needs [C]onsidering the huge expenditures on the war this cannot be dismissed as idle speculation.

Id.

360. *See* Sugarman, *supra* note 344, at 472.

These courts set forth four reasons to justify their conclusion: First, the courts do not have the necessary expertise to make competent judgments about the conduct of foreign affairs. Second, questions concerning the conduct of foreign affairs and the use of military power are within the exclusive province of coordinate branches of government. Third, the courts are reluctant to render a decision that could have unpredictable international consequences. Fourth, the courts felt that they lacked appropriate standards to reach a decision.

Id. But see *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (1st Cir. 1971), *cert. denied*, 404 U.S. 869 (1971) (holding that the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. The propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia, however, is a political question). *See also* *Massachusetts v. Laird*, 451 F.2d 26, 30 (1st Cir. 1971); *Berk v. Laird*, 429 F.2d 302, 305 (2nd Cir. 1970). The principles governing the determination of a political questions are set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

361. *Luftig v. McNamara*, 373 F.2d 664-65 (D.C. Cir. 1967), *cert. denied*, 347 U.S. 934 (1954).

362. *Id.* at 665-66.

363. *Id.*

Courts also rested their invocation of the political question doctrine on the grounds of public policy. In *Sisson*, Judge Wyzanski explained that the federal courts were ill-equipped to analyze the divergent factual contentions of those who challenged or supported the legality of the war:

It is not an act of abdication when a court says that political questions of this sort are not within its jurisdiction. It is a recognition that the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits.³⁶⁴

In addition, judges pointed out that a decision which questioned the legality of the Vietnam War might impede the conduct of foreign policy. Judicial interference with the prosecution of the war could lower morale and cripple the American war effort, strain relations with Asian allies, and encourage Communist subversion throughout the third world. It was noted that these are the type of "implications for which the political branches must, under our system of government, stand responsible at the polls."³⁶⁵

The United States Supreme Court avoided the Vietnam issue by denying certiorari³⁶⁶ or affirming lower court decisions without issuing an opinion.³⁶⁷ The Court clearly was reluctant to interfere with the war effort. In *Gillette v. United States*,³⁶⁸ the Court majority interpreted the Selective Service Act so as to preclude so-called "selective conscientious objection"—the recognition of conscientious objector status for those opposed to the Vietnam War rather than to "war in any form."³⁶⁹ Justice Marshall emphasized that the "exemption of objectors to particular wars would weaken the resolve of those who otherwise would feel themselves bound to serve despite personal cost, uneasiness at the prospect of violence, or even serious moral reservations or policy objections concerning the particular conflict."³⁷⁰ Justice Marshall stressed that this "mood of bitterness and cynicism"³⁷¹ would interfere with the Government's "interest in procuring the manpower necessary for military purposes."³⁷²

Justices Stewart and Douglas chastised their brethren for refus-

364. 294 F. Supp. at 515.

365. 347 F. Supp. at 707.

366. See *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), *cert denied*, 389 U.S. 934 (1967), *reh. denied*, 389 U.S. 1025 (1967).

367. *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

368. *Gillette v. United States*, 401 U.S. 437 (1971).

369. *Id.* at 443.

370. *Id.* at 459-60.

371. *Id.* at 460.

372. *Id.* at 462. But see *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970) (recognizing selective conscientious objection).

ing to rule on the constitutionality of the Vietnam War.³⁷³ Dissenting from the Supreme Court's refusal to grant certiorari in *Mora v. McNamara*,³⁷⁴ Justice Stewart admonished the Court:

These are large and deeply troubling questions We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates I think the Court should squarely face them by granting certiorari and setting this case for oral argument.³⁷⁵

In *Mitchell v. United States*,³⁷⁶ Justice Douglas enumerated the legal questions surrounding the Vietnam War and conceded that "[t]hese are extremely sensitive and delicate questions. But they should, I think, be answered I think the petition for certiorari should be granted."³⁷⁷

The Supreme Court's decisions to deny certiorari, to dismiss suits without a reasoned opinion, and to avoid discussing the legality of the Vietnam War, along with the decisions of other courts, helped to create a "limbo of legality" surrounding the war.³⁷⁸ The impact of the Court's decisions was to further fuel the legal debate over the war.³⁷⁹ Professor Louis Loeb, writing in 1969, conceded that there were valid political reasons for the Court's reluctance to become embroiled in the Vietnam debate.³⁸⁰ However, he argued that this judicial abstention must be "rejected morally. Individual life, liberty and belief were and are at stake."³⁸¹

This judicial abdication meant that the Executive and the military were free to prosecute the war without having to concern themselves with legal oversight or restraint. As a result, those who designed American military strategies and tactics paid little attention to the requirements of the international humanitarian law of war.³⁸² There was no detailed public debate concerning the legality of American military strategies and tactics in Vietnam. As Professor Wolfgang Friedmann noted in 1967, the Vietnam Conflict was being

373. See *Mora v. McNamara*, 389 U.S. at 934.

374. *Id.*

375. *Id.* at 935 (Stewart, J., dissenting).

376. *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

377. *Id.* at 973-74 (Douglas, J., dissenting).

378. Graham Hughes, *Civil Disobedience And The Political Question Doctrine*, 43 *N.Y.U. L. Rev.* 1, 18 (1968).

379. *Id.* at 18-9. Judicial reluctance to review the war is discussed in Falk, *The Nuremberg Defense in the Pentagon Papers Case*, 13 *COLUM. J. TRANSNAT'L L.* 8, 211-14 (1974).

380. Louis Loeb, *The Courts And Vietnam*, 18 *AM. U. L. REV.* 376, 395 (1969).

381. *Id.*

382. See generally *CRIMES OF WAR A LEGAL POLITICAL-DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS, AND SOLDIERS FOR CRIMINAL ACTS IN WAR* (Richard A. Falk, Gabriel Kolko & Robert J. Lifton eds., 1971) [hereinafter Falk, Kolko & Lifton].

pursued in a "legal vacuum."³⁸³

II. American War Crimes in Vietnam

A. *American Strategy, Tactics And The Humanitarian Law Of War*

The United States confronted a guerilla war in Vietnam. The NLF and North Vietnamese launched a war of attrition designed to frustrate and exhaust the morale of the American forces. The Vietnamese avoided large-scale confrontations. Instead, they relied on "hit and run" tactics-quickly striking and then disappearing into the jungles. The Americans were frustrated over their inability to locate and to engage the Vietnamese. They adopted a military strategy designed to deny the guerrillas the safety of their jungle sanctuary. This involved the destruction of vegetation and food crops, the forced removal of villagers from the war zone so as to prevent them from assisting the enemy, and the systematic deployment of heavy ordinance against suspected guerilla headquarters.³⁸⁴ This policy of "[t]error bombing and the indiscriminate killing" was based on "four key factors."³⁸⁵

- (a) American wealth and technological capability which permit the use of virtually unlimited supplies of ordinance and modern weapons, and which constitutes the U.S. military advantage; (b) the absence of any threat of enemy retaliation by terror attacks on the United States; (c) the desire, and political need, to reduce *American* casualties, which in the short run is helped by the lavish use of firepower; (d) the fact that the bulk of the rural population of South Vietnam supports or tolerates the NLF and DRV and is thus treated as enemy.³⁸⁶

The prominent French philosopher Jean-Paul Sartre argued that America was not concerned only with defeating the Vietnamese. They were sending a stern message to the Third World--that the price of revolt would be genocide.³⁸⁷ Sartre wrote that this "genocidal example is addressed to the whole of humanity. By means of this warning, six percent of mankind hopes to succeed in controlling the other ninety-four percent at a reasonably low cost in money and effort."³⁸⁸

There is no question that United States policy in Vietnam was

383. Friedmann, *supra* note 339, at 785.

384. See generally Gabriel Kolko, *War Crimes And The Nature Of The Vietnam War* in Falk, Kolko & Lifton, *supra* note 382, at 403.

385. EDWARD S. HERMAN, *ATROCITIES IN VIETNAM MYTHS AND REALITIES* 58 (1970).

386. *Id.* at 58-59.

387. Jean-Paul Sartre, *On Genocide*, in Falk, Kolko & Lifton, *supra* note 382, at 534-49.

388. *Id.* at 540.

subject to the requirements of the humanitarian law of war.³⁸⁹ The Geneva Conventions of 1949³⁹⁰ had been ratified by the United States³⁹¹ as well as by North³⁹² and South Vietnam.³⁹³ The United States³⁹⁴ and South Vietnam³⁹⁵ acknowledged that the Conventions were applicable to the Vietnam War. The North Vietnamese and the NLF, however, proclaimed that they were not bound by the Geneva Conventions.³⁹⁶ Nevertheless, the laws of war apply to "all cases of declared war or of any other armed conflict . . . even if the state of war is not recognized by one of [the Parties]."³⁹⁷ The Conventions also shall apply "[a]lthough one of the Powers in conflict may not be a party to the present Convention."³⁹⁸ Nor is a declaration of war required. The United States Army Field Manual proclaims that "a declaration of war is not an essential condition of the application of . . . [customary humanitarian] law. Similarly, treaties relating to 'war' may become operative notwithstanding the absence of a formal declaration of war."³⁹⁹

389. *Ex Parte Quirin*, 317 U.S. 1 (1942). The Supreme Court recognized that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *Id.* at 27-28. The law of warfare is part of customary and positive international law which is binding upon the United States. *See generally* *Paquete Habana*, 175 U.S. 677 (1900).

390. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 (1955) 3 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 (1955) 3 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, (1955) 3 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War, Aug. 12, 1949, (1955) 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

391. *See* 213 U.N.T.S. 378-84 (1955) *cited in* Comment, *Punishment for War Crimes: Duty-or Discretion*, 69 MICH. L. REV. 1312, 1315 n.21 (1971).

392. *See* 275 U.N.T.S. 335-42 (1957) *cited in* *Punishment for War Crimes: Duty or Discretion*, 69 MICH. L. REV. 1312, 1316 n.32.

393. 181 U.N.T.S. 349-52 (1953) *cited in* *Punishment for War Crimes: Duty or Discretion*, 69 MICH. L. REV. 1312, 1316 n.32.

394. Letter from Dean Rusk, Sec. of State, to the International Committee of the Red Cross, Aug. 10, 1965, 4 I.L.M. 1173 (1965).

395. Letter from Tran-Van-Do, Minister of Foreign Affairs, to the International Committee of the Red Cross, Aug. 10, 1965, 4 I.L.M. 1174 (1965).

396. Letter from Bui Tan Linh, Acting Head of the Cabinet, to the International Committee of the Red Cross, Aug. 31, 1965, 5 I.L.M. 124 (1966). The North Vietnamese announced that they would treat American pilots as war criminals. *Id.* The North Vietnamese lodged a significant reservation to Article 85 of the Prisoners of War Convention (Geneva III). *See* Comment, *The Geneva Convention And The Treatment Of Prisoners Of War In Vietnam*, 80 HARV. L. REV. 851, 862 (1967). It would be "most difficult for the United States to argue that the Geneva Conventions of 1949 do not apply vis-a-vis the National Liberation Front which is not a party, inasmuch as the United States has consistently characterized the NLF as a political arm of Hanoi in the South." Anthony A. D'Amato, Harvey L. Gould & Larry D. Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CALIF. L. REV. 1055, 1059 (1969) [hereinafter D'Amato, Gould & Woods].

397. This is stated in Article 2, common to all four conventions, *supra* note 390.

398. *Id.*

399. Department of the Army Field Manual, No. 27-19, para. 9 (1956) *reprinted in*

In any event, "the United States [had] never denied nor contested the applicability of the international law of warfare to the American military engagements in Vietnam."⁴⁰⁰ It explicitly had recognized that the conflict in Vietnam was an "international conflict to which both customary and written or conventional law of war apply, and the United States [had] declared its intent to observe this law."⁴⁰¹ As a result, there is no question that both the Geneva Conventions and other international treaties were fully applicable to American troops in Vietnam.⁴⁰² United States military activities also were to be guided by the Rules of Engagement (ROE) issued by the Joint Chiefs of Staff⁴⁰³ and by field manuals issued by the various military branches.⁴⁰⁴ Despite this purported adherence to international treaties, United States' military practices and procedures were in gross and persistent disregard of the humanitarian law of war.

American rural strategy was based on what, in the language of the bureaucracy, was termed "forced-draft urbanization and mod-

Excerpts From The U.S. Army Field Manual, The Law of Land Warfare, in WAR CRIMES AND THE AMERICAN CONSCIENCE 184, 188 (Erwin Knoll & Judith Nies McFadden eds. 1970) [hereinafter Army Field Manual].

400. D'Amato, Gould & Woods, *supra* note 396, at 1059.

401. United States Army, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT: VOLUME I THE REPORT OF THE INVESTIGATION 9-2 (1970) [hereinafter PEERS REPORT]. The Geneva Conventions of 1949 are applicable to conflicts of "an international character occurring in the territory of one of the High Contracting Parties. In other instances, the Parties shall be bound by provisions of common Article three which sets forth certain minimum standards of conduct. Each convention contains a common Article 3, *supra* note 390. Article Three, in part, provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

Supra note 390, at art. 3.

402. See generally Convention (No. IV) Respecting The Laws And Customs Of War On Land, With Annex Of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter Hague Convention].

403. PEERS REPORT, *supra* note 401, at 9-5-6.

404. See *supra* note 399.

ernization."⁴⁰⁵ This was a euphemism for expelling the Vietnamese from their villages in order to deny the guerrillas a base of support. Central to this strategy was the strategic hamlet program which involved the evacuation of peasants to government-controlled enclosed villages. The peasants' livestock, possessions, and crops were destroyed to prevent them from being used to sustain enemy forces. Those peasants who were forced from their ancestral lands and deported into these new hamlets experienced alienation, anomie, and developed resentment towards the South Vietnamese government.⁴⁰⁶ Living conditions in the hamlets were appalling⁴⁰⁷ and those inside invariably shifted their loyalties to the NLF.⁴⁰⁸ Article 49 of the Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War prohibits "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory."⁴⁰⁹ Evacuation is only permitted in order to provide for the "security" of the population or if "imperative military reasons so demand."⁴¹⁰ Also, those transferred are to be provided proper hygiene, health, safety and nutrition and are to be transported back to their homes as soon as hostilities in the area have ceased.⁴¹¹

The massive relocation program clearly would have been permissible to protect the rural population.⁴¹² However, the true purpose

405. Noam Chomsky, *The Rule of Force in International Affairs*, 80 YALE L.J. 1456, 1470 (1971).

406. FITZGERALD, *supra* note 48, at 165-67.

407. TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 147 (1971).

408. KARNOW, *supra* note 44, at 273-74.

409. Geneva IV, *supra* note 390, at art. 49.

410. *Id.*

411. *Id.*

412. Waldemar A. Solf, *A Response To Telford Taylor's Nuremberg And Vietnam: An American Tragedy*, 5 AKRON L. REV. 43, 52-53 (1972). The Geneva Civilian's Convention distinguishes between the law applicable in occupied territory on the one hand, and the minimum protection to the population generally (including the battle area) on the other." *Id.* at 50. A major debate concerned whether various rural areas were to be considered occupied or contested territory. *Id.* I am assuming that Vietnamese in rural areas were protected by Geneva IV, *supra* note 390. The Civilian Persons Convention applies to "all cases of partial or total occupation of a territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Geneva IV, *supra* note 390, at art. 2. Article 4 goes on to state that persons protected by the Convention "are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Geneva IV, *supra* note 390, at art. 4. These provisions certainly encompassed Vietnamese being detained by American troops. However, Article 4 goes on to exclude those who are nationals of a State which "has normal diplomatic representation in the State in whose hands they are." Geneva IV, *supra* note 390, at art. 4. In the latter instance, it is thought that individuals being detained can rely on normal diplomatic processes for protection against abuse. It seems clear, however, that diplomatic channels were not sufficient to provide protection to Vietnamese civilians who were being confronted or detained by American troops. TAYLOR, *supra* note 407, at 133. The best approach to analyzing article 4 is to distinguish between "friendly" and "enemy" territory. Most contested rural areas of South Vietnam were under NLF control and fell within the latter category. The South Vietnamese regime viewed the population as hostile and had little interest in extending protection to the inhabitants. TAYLOR, *supra* note 411, at 134.

was to insulate the peasantry from the influence of the Viet Cong and to create a base of support for the South Vietnamese regime.⁴¹³ More importantly, the strategic hamlet program was a central component in an illegal military rural strategy. The areas vacated by the peasantry were declared "free fire zones" in which by official declaration, "there are no friendly forces or populace and in which targets may be attacked on the initiative of US/FW (Free World) commanders."⁴¹⁴ Pursuant to this policy, United States' forces breached the law of war by making no effort to distinguish between civilians and combatants.⁴¹⁵ This was the so-called "mere gook rule," according to which "anything that moves and has a yellow skin is an enemy, unless there is incontrovertible evidence to the contrary."⁴¹⁶

The United States also engaged in a scorched earth policy. Vacated villages were burned to the ground. At times, inhabited villages were surrounded and attacked without warning in the course of "search and destroy" missions.⁴¹⁷ As many as four million refugees may have been created by this scorched earth policy.⁴¹⁸ This destruction and immolation of civilian foodstuffs and property was in flagrant disregard of law of war.⁴¹⁹

"Free fire" zones were carpeted with anti-personnel weapons such as cluster bombs units (CBU's)--canisters which burst in the air, each scattering three hundred baseball-sized explosives which detonated on impact. Each unit, in turn, scattered hundreds of pea-sized, napalm coated pellets at a high velocity over a wide area. CBU's were inherently incapable of discriminating between civilians and combatants. Once penetrating the human body, these pellets were both difficult to detect and to remove.⁴²⁰ The Hague Convention introduces an overtly moral dimension into the humanitarian law of war and admonishes that the "right of belligerents to adopt means of injuring the enemy is not unlimited."⁴²¹ The use of CBU's also would appear to fall within the proscription against killing or wounding "treacherously individuals belonging to the hostile nation

413. KARNOW, *supra* note 44, at 272-73. By September 1962 it is estimated that almost one-third of the population of South Vietnam was living in the hamlets. This figure is exaggerated, but it provides some sense of the extensive nature of the program. *Id.* at 273.

414. HERMAN, *supra* note 385, at 61 *quoting* Civilian Casualty, Social Welfare and Refugee problems in South Vietnam, Hearings before the Subcommittee on Refugees, Senate Judiciary Committee, 91st Congress, First Session, part 1, 1969, 27.

415. Geneva IV, *supra* note 394, at art. 27.

416. Chomsky, *supra* note 405, at 1470.

417. HERMAN, *supra* note 385, at 62, 83-87.

418. *Id.* at 86.

419. See Geneva IV, *supra* note 390, at arts. 53 (prohibits destruction by the Occupying Power of a private person's real or personal property) 55 (Occupying Power has the duty of ensuring that the population is provided the necessary food and medical supplies).

420. HERMAN, *supra* note 385, at 72-74.

421. Hague Convention, *supra* note 402, art. 22.

or army;"⁴²² as well as within the prohibition against the employment of arms, projectiles, or material calculated to "cause unnecessary suffering."⁴²³

The CBU was one of an array of legally questionable weapons deployed by American forces. Large quantities of the powerful tear-gas CS was heavily used in South Vietnam. The use of CS rose from 93,000 pounds in 1965, to 869,000 pounds in 1968 to 2,334,000 pounds in 1969. Tear gas mainly was deployed to force NLF soldiers out of their tunnels. The gas induced vomiting and in many cases infected the lungs and caused pulmonary edema.⁴²⁴

Fifty thousand tons of napalm were dropped on enemy forces and on villages suspected of being friendly to the NLF by the end of 1966.⁴²⁵ Napalm is a jellied gasoline combined with phosphorus and other chemicals, which depending on the mixture, burns at between eight hundred and three thousand degree centigrade. Those suffering phosphorous burns die a particularly painful death--the phosphorus fragments continue to burn inside the body for eight to ten days.⁴²⁶ The United States also deployed a range of chemical herbicides designed to destroy crops, vegetation, and foliage.⁴²⁷ A 1967 Japanese study claimed that United States' herbicides had contaminated almost 3.8 million acres of arable land in South Vietnam and killed roughly one thousand peasants and over one thousand head of livestock. Many of these herbicides entered the food chain and caused fetal death and birth defects.⁴²⁸ Noam Chomsky, in 1971, described the effects of the defoliant program.

Some six and one-half million acres have been defoliated with chemical poisons, often applied at tremendous concentrations. Included are perhaps one-half million acres of crop-growing land. South Vietnam, once a major rice-exporter, is now importing enormous quantities of food . . . [a]bout one acre in six has been sprayed by defoliants. In many areas, there are no signs of recovery. Crop destruction is done largely with an arsenical compound which may remain in the soil for years and is not cleared for use on crops in the United States. A contaminant in

422. *Id.* at art. 23(b).

423. *Id.* at 23(e). This Article reflects several principles. Maiming and killing should be efficient—a weapon should not cause superfluous suffering to the victim. The damage resulting from the deployment of a weapon also should be proportionate to the objective to be attained. A weapon, such as the CBU, which causes severe individual suffering to combatants and which, while targeting combatants, inflicts needless injury on civilians violates this provision.

424. HERMAN, *supra* note 389, at 81.

425. *Id.* at 71.

426. *Id.* at 71-72.

427. *Id.* at 75.

428. Seymour Hersh, *Chemical Warfare In Vietnam*, in Falk, Kolko & Lifton, *supra* note 382, at 285, 286-87. As much as one-half of the arable land in Vietnam may have been sprayed. *Id.* at 288.

the herbicides, dioxin, is known to be a highly potent agent causing birth defects in mammals.⁴²⁹

The Geneva Protocol of 1925⁴³⁰ prohibits the "use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices."⁴³¹ At the time of the Vietnam War, the United States was not a signatory to the Protocol. However, the agreement was viewed as part of customary international law and was considered binding upon all countries, including the United States.⁴³² The Protocol also clearly encompasses and prohibits the use of tear gas⁴³³ as well as chemical defoliants and herbicides.⁴³⁴ Such sprays also appear to contravene the Hague Convention's prohibition on "poison or poisoned weapons."⁴³⁵ Napalm arguably falls within the prohibition on "analogous liquids, materials or devices."⁴³⁶ A different approach might be to recognize that napalm emits large quantities of carbon monoxide. This deadly asphyxiating gas is at least "equally effective in terms of the number of victims killed or injured as the direct burning by napalm itself Thus, as a lethal-gas-producing 'device' . . . napalm may come within the prohibition of the laws of war even though its most obvious and dramatic effect is combustion."⁴³⁷

In truth, all of South Vietnam and a significant portion of North Vietnam were transformed into a "free fire zone." The United States unleashed an unrelenting air war. By the end of 1969, it had dropped seventy tons of bombs for every square mile of North and South Vietnam; and five hundred pounds of bombs had been dropped for every resident of Vietnam.⁴³⁸ The tonnage of bombs dropped in all of Vietnam, an agricultural country slightly larger in size than

429. Chomsky, *supra* note 405, at 1473.

430. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous Or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

431. *Id.*

432. D'Amato, Gould & Woods, *supra* note 396, at 1091. See also William V. O'Brien, *Selective Conscientious Objection And International Law*, 56 GEO. L.J. 1080, 1117-8 (1968).

433. HERMAN, *supra* note 385, at 82-83.

434. D'Amato, Gould & Woods, *supra* note 396, at 1095. The authors argue that "[a]lthough not technically 'gases,' these spray chemicals ejected in mist or cloud-like form are covered by the language of the Geneva Protocol which applies to 'gases, and . . . all analogous liquids, materials or devices.'" *Id.*

435. Hague Convention, *supra* note 402, at art. 23(a).

436. D'Amato, Gould & Woods, *supra* note 396, at 1096.

437. *Id.* at 1097. The debate over the use of tear gas, herbicides and tear gas need not focus on the nuances of legal language. The so-called Martens Clause of the Hague Convention states that the humanitarian law of war should be broadly interpreted in light of "the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. Hague Convention, *supra* note 402.

438. HERMAN, *supra* note 385, at 55. An average of 1,600 B-52 sorties per month were flown during 1970. *Id.* at 56. During the period 1967-9, total United States ordinance expenditures out-numbered those by the NLF-DRV by a ratio of 450-to-1. *Id.* at 55.

New York State, exceeded the total tonnage of bombs expended by the Allies in the European and Asian theaters during World War II.⁴³⁹ In order to dislodge the enemy, U.S. forces often deployed bombs in an indiscriminate fashion against villages thought to harbor the Viet Cong.⁴⁴⁰ Such attacks also were designed to terrorize the peasantry in order to intimidate and deter them from assisting the guerrillas.⁴⁴¹ As one general noted "[y]ou've got to dry up the sea the guerilla swim in--that's the peasants--and the best way to do that is blast the hell out of their villages so they'll come into our refugee camps. No villages, no guerrillas: simple."⁴⁴² In the North, a number of studies determined that hospitals, schools, and churches were intentionally destroyed.⁴⁴³ In addition, the United States targeted dikes and dams, in an attempt to flood cities and destroy the water supply.⁴⁴⁴ As the war droned on, northern fishing villages and rice paddies were targeted.⁴⁴⁵

The conventional view is that there are no firm rules limiting aerial bombardment.⁴⁴⁶ However, bombing certainly may not be intentionally directed against non-military targets.⁴⁴⁷ The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick prohibits attacks on hospitals and mobile medical units.⁴⁴⁸ The Hague Convention is even more expansive and extends protection to buildings dedicated to medical, humanitarian, religious, scientific purposes as well as to historic monuments.⁴⁴⁹ The Hague Convention also states that the attack or bombardment of "towns, villages, dwellings or buildings which are undefended is prohibited."⁴⁵⁰ The 1923 Hague Rules of Aerial Warfare were never ratified and are not legally binding.⁴⁵¹ Nevertheless, they have some persuasive authority in adjudging the legality of aerial bombardment

439. D'Amato, Gould & Woods, *supra* note 396, at 1084.

440. Erich Norden, *American Atrocities In Vietnam*, in Falk, Kolko & Lifton, *supra* note 382, at 265, 278-80.

441. *Id.* at 282. See also Richard Gott, *Precision Bombing Not Very Precise*, in Falk, Koko & Lifton, *supra* note 382, at 397.

442. Chomsky, *supra* note 405, at 1470.

443. D'Amato, Gould & Woods, *supra* note 396, at 1085-86.

444. *Id.* at 1087.

445. *Id.* at 1087-88.

446. See Hamilton Desaussure, *The Laws of Air Warfare: Are There Any?*, 5 INT'L LAW. 527 (1971).

447. D'Amato, Gould & Woods, *supra* note 396, at 1081-2. Non-military targets are expansively defined to encompass roads, bridges, railroads tunnels and transportation facilities. *Id.* at 1081.

448. Geneva I, *supra* note 390, at art. 19.

449. Hague Convention, *supra* note 402, at art. 27.

450. *Id.* at art. 25. The officer in command of an attacking force must before commencing a bombardment, except in cases of assault, "do all in his power to warn the authorities." *Id.* at art. 26.

451. Hague Rules of Aerial Warfare, reprinted in 17 AM. J. INT'L L. (Supp.) 245 (1923).

against civilian targets.⁴⁵² Article 24 states that aerial bombardment is legitimate only when directed against a military object.⁴⁵³ The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited.⁴⁵⁴ Article 22 prohibits aerial bombardment for the purpose of terrorizing the civilian population or damaging private property which is not of a military character or injuring non-combatants.⁴⁵⁵

Leaflets distributed by American troops did warn villagers that their hamlets would be destroyed if they cooperated with or harbored the Viet Cong.⁴⁵⁶ Such notice, however, has no legal significance. These air strikes clearly were violative of the proscription against attacking civilian targets.⁴⁵⁷ In addition, they constituted illegal reprisals and an illicit collective penalty, intimidation and terror tactic.⁴⁵⁸

The United States Rules of Engagement (ROE) affirm that aerial attacks against civilians and civilian targets are prohibited. Airpower was to be employed with the objective of eliminating "incidents involving friendly forces, noncombatants and damage to civilian property."⁴⁵⁹ American forces were admonished that whether an individual, at any given time, lived in a Viet Cong or South Vietnamese hamlet depends to a large extent upon factors beyond their control. As a result, commanders were directed to avoid the deployment of "unnecessary force leading to noncombatant battle casualties in area temporarily controlled by the VC."⁴⁶⁰

Civilians suspected of being part of the Viet Cong infrastructure were targeted for assassination or arrest under the Operation Phoenix Program.⁴⁶¹ The Saigon government claimed that under the Phoenix program, 40,994 suspected civilians who were working on

452. D'Amato, Gould & Woods, *supra* note 396, at 1083.

453. Hague Rules of Aerial Warfare, *supra* note 451 at art. 24(1). A military objective is an object of which "the destruction or injury would constitute a distinct military advantage to the belligerent.

454. *Id.* at art. 24(3). Such buildings may be bombarded where there "exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population." *Id.* at art. 24(4).

455. *Id.* at art. 22.

456. TAYLOR, *supra* note 407, at 144.

457. See *supra* note 446 and accompanying text.

458. TAYLOR, *supra* note 407, at 145. Geneva IV, *supra* note 390, at art. 33 (prohibiting collective penalties and measures of intimidation and terrorism as well as reprisals).

459. PEERS REPORT, *supra* note 401, at 9-6.

460. *Id.* at 9-8. The ROE did permit the bombing or shelling without warning if American troops received fire from the village. The villagers were presumed able to prevent the use of their village as a fire base. Any village known to be hostile could be bombed or shelled if its inhabitants were warned in advance, either by the dropping of leaflets or by helicopter loud-speaker. See MICHAEL WALZER, JUST AND UNJUST WARS A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 189 (1977).

461. HERMAN, *supra* note 385, at 47.

behalf of the enemy were killed between August 1968 and the middle of 1971.⁴⁶² In 1971, William Colby, Director of the Central Intelligence Agency (CIA), estimated that Operation Phoenix had detected and interned twenty-eight thousand civilian members of the Viet Cong cadre in South Vietnam. According to Colby, twenty thousand had been killed and another seventeen thousand had defected.⁴⁶³ These covert operations usually were carried out by former criminals or communists recruited and paid by the CIA.⁴⁶⁴ In their eagerness to meet their quota, these CIA operatives often inadvertently targeted "innocent" individuals.⁴⁶⁵ Francis FitzGerald writes that the terror of the Phoenix program was reminiscent of that practiced under Diem. The program enabled the United States to ignore the limitations of the humanitarian law of war and to arrest, torture or kill "anyone in the country, whether or not the person was carrying a gun."⁴⁶⁶ This covert program, of course, was a flagrant violation of international humanitarian law of war. It is prohibited to engage in violent attacks on civilians.⁴⁶⁷ The arbitrary internment or execution of civilians also was in disregard of the due process protections to be accorded to those suspected of criminal offenses.⁴⁶⁸

The same type of arbitrary treatment was meted out to prisoners of war. There is substantial anecdotal evidence that American troops tortured, decapitated, shot and pushed prisoners out of helicopters.⁴⁶⁹ Most of those turned over to the South Vietnamese reportedly were subjected to abuse and torture.

Methods of torture include mutilation, disembowelment, near-drowning, bamboo slivers under fingernails, smothering with wet towels, dragging the prisoner behind a moving vehicle, pouring water with hot pepper into the nose, wire-cage confinement, and rice-paddy strangulation. After torture, the captors usually execute the prisoner. Peter Hamill, correspondent for the New York Post, wrote in 1966 that there are no huge prisoner-of-war camps springing up in South Vietnam as there were during the second World War; prisoners are "usually executed."⁴⁷⁰

462. NOAM CHOMSKY & EDWARD S. HERMAN, *THE POLITICAL ECONOMY OF HUMAN RIGHTS—VOLUME I: THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM* 324 (1979).

463. NEIL SHEEHAN, *A BRIGHT SHINING LIE JOHN PAUL VANN AND AMERICA IN VIETNAM* 733 (1988).

464. CHOMSKY & HERMAN, *supra* note 462, at 325. They were paid eleven thousand dollars for a living Viet Cong operative and five thousand five hundred dollars for a dead Viet Cong. *Id.*

465. *Id.* at 326-27.

466. FITZGERALD, *supra* note 48, at 550.

467. *See* Geneva IV, *supra* note 390, at arts. 27-33.

468. *Id.* at arts. 66-75.

469. D'Amato, Gould & Woods, *supra* note 396, at 1077-79.

470. *Id.* at 1079.

The Americans, of course, schooled the South Vietnamese in these techniques and tolerated, if not encouraged, the abuse of POW's.⁴⁷¹

Such abuse, torture, and murder of prisoners was a flagrant violation of international humanitarian law.⁴⁷² Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War provides that prisoners must be "humanely treated."⁴⁷³ Acts causing death or which seriously endanger the health of a prisoner of war are prohibited and constitute a "serious breach" of the Convention.⁴⁷⁴ The transfer of prisoners to the South Vietnamese did not absolve the United States of responsibility. Before turning such prisoners over to the South, the United States was obligated to satisfy itself of the "willingness and ability of the South Vietnamese to adhere to the Geneva Convention."⁴⁷⁵ Once having received notice that the South Vietnamese were not carrying out the requirements of the Convention, the United States was required to "take effective measures to correct the situation or . . . [to] request the return of the prisoners of war."⁴⁷⁶ Telford Taylor, Chief Counsel for the United States at Nuremberg, concluded that, in view of the South Vietnamese record of prisoner mistreatment "it might well be doubted whether the circumstances of transfer of our prisoners to their hands was in compliance with these requirements."⁴⁷⁷

Vietnam, in the words of Noam Chomsky and Edward S. Herman, was a "deliberately imposed bloodbath."⁴⁷⁸ American decision-makers were determined to destroy the Viet Cong and their base of support.⁴⁷⁹ Success was measured in terms of body counts — the number of Vietnamese bodies left on the battlefield.⁴⁸⁰ General William DePuy, who was instrumental in designing the war of attrition against the Vietnamese, proclaimed that "[t]he solution in Vietnam is more bombs, more shells, more napalm . . . till the other side cracks and gives up."⁴⁸¹ The key, according to General William Westmoreland the Commander of United States forces in Vietnam, was to "'stomp' the enemy to death."⁴⁸² When questioned about the large number of civilian casualties from air strikes and shelling, Westmoreland noted that "Yes, . . . it is a problem . . . but it does

471. *Id.* at 1080-81.

472. Hague Convention, *supra* note 402, at arts. 4, 7.

473. Geneva III, *supra* note 390, at art. 13.

474. *Id.*

475. *Id.* at art. 12.

476. *Id.*

477. TAYLOR, *supra* note 407, at 149-50. *See generally* HERMAN, *supra* note 385, at 68-70.

478. CHOMSKY & HERMAN, *supra* note 462, at 304.

479. *Id.* at 308.

480. *Id.* at 310.

481. *Quoted in* Sheehan, *supra* note 463, at 619.

482. *Quoted in id.* at 620.

deprive the enemy of the population, doesn't it?"⁴⁸³ In the end, between a fifth and a quarter of the civilian population was wounded or killed by military operations in Vietnam.⁴⁸⁴ This translated into roughly twenty-five thousand civilian dead per year, an average of sixty-eight men, women and children every day.⁴⁸⁵ The most lasting memory of this onslaught was the My Lai massacre in which as many as four hundred helpless civilians were intentionally shot at close range by American troops.⁴⁸⁶ One officer observed that "My Lai represented to the average professional soldier nothing more than being caught in a cover-up of something which he knew had been going on for a long time on a smaller scale."⁴⁸⁷ Any estimate of war-related fatalities, of course, cannot accurately account for those who later died from war-related maladies and toxic poisoning. For instance, the use of the defoliant Agent Orange left the South Vietnamese with a level of dioxin poison in their bodies which was three times higher than the inhabitants of the United States.⁴⁸⁸

The Vietnam massacre generally is attributed to misguided policies rather than to deliberate cruelty. In his classic defense of President Lyndon Johnson, Townsend Hoopes wrote:

Lyndon Johnson, though disturbingly volatile, was not in his worst moments an evil man in the Hitlerian sense. And his principle advisers were, almost uniformly, those considered when they took office to be among the ablest, the best, the most humane and liberal men that could be found for public trust. No one doubted their honest, high-minded pursuit of the best interests of their country, and indeed of the whole non-communist world, as they perceived those interests.⁴⁸⁹

Chomsky and Herman argue that any notion that the Vietnam bloodbath was the inadvertent result of misguided policies is belied by the "mile after mile of lunar craters, razed villages, and the graves of hundreds of thousands of permanently pacified peasants."⁴⁹⁰ Was all this an accident? Did it escape notice? They con-

483. *Quoted in id.* at 621. Westmoreland compared United States policy to a "meat-grinder" which would mechanically exterminate the enemy. CHOMSKY & HERMAN, *supra* note 462, at 308.

484. HERMAN, *supra* note 385, at 44. The standard figures for civilian casualties are 400,000 dead, 900,000 wounded and 6.4 million refugees. CHOMSKY & HERMAN, *supra* note 462, at 312.

485. SHEEHAN, *supra* note 463, at 617.

486. *See* PEERS REPORT, *supra* note 401, at 2-3.

487. EDWARD L. KING, *THE DEATH OF THE ARMY 122* (1972) *quoted in* DOUGLAS KINNARD, *THE WAR MANAGERS AMERICAN GENERALS REFLECT ON VIETNAM* 52 (1977).

488. SHEEHAN, *supra* note 463, at 619.

489. Townsend Hoopes, *The Nuremberg Suggestion*, in Falk, Koko & Lifton, *supra* note 382, at 233, 236.

490. NOAM CHOMSKY & EDWARD S. HERMAN, *THE POLITICAL ECONOMY OF HUMAN RIGHTS—VOLUME I: AFTER THE CATAclysm: POSTWAR INDOCHINA AND THE RECONSTRUCTION OF IMPERIAL IDEOLOGY* 15 (1979).

clude that patriotism blinded Americans to the fact that their leadership deliberately committed massive atrocities in Vietnam.

The beauty of nationalism is that whatever the means your state employs, since the leadership always proclaims noble objectives, and a nationalist can swallow these, wickedness is ruled out and stupidity explains all despicable behavior. It is only for assorted enemies that we look closely at *real* objectives and apply the more serious observation that means are both important in themselves as measures of evil and are inseparably related to (and interactive with) ends.⁴⁹¹

American conduct in Vietnam, of course, not only was morally questionable, but flagrantly trampled upon international law.⁴⁹²

B. Those At The Bottom: The Failure To Prosecute American Combatants In Vietnam

The Geneva Conventions enumerate certain "grave breaches" of the humanitarian law of war which encompass those acts committed by the United States in Vietnam:

Grave breaches . . . shall be . . . wilful killing, torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person . . . wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁴⁹³

High contracting parties are required to enact any legislation necessary to provide effective penal sanctions for persons "committing or ordering to be committed, any of the grave breaches" of the Convention.⁴⁹⁴ A Signatory State also is obligated to search for persons alleged to have committed such grave breaches and to bring such persons to trial.⁴⁹⁵ No High Contracting Party "shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party" in respect to grave breaches of the Convention.⁴⁹⁶

The United States did not fulfill its obligation to bring those

491. *Id.* at 15-16.

492. See generally AGAINST THE CRIME OF SILENCE PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL (John Duffett ed. 1968). See generally *supra* notes 412-87 and accompanying text.

493. See Geneva IV, *supra* note 390, at art. 147.

494. *Id.* at art. 146.

495. *Id.* A High Contracting Party may also, if it prefers, hand such persons over to another High Contracting Party for trial. *Id.*

496. *Id.* at art. 148.

who committed grave breaches of the law of war to trial.⁴⁹⁷ One difficulty was that the military possessed no jurisdiction over discharged service personnel.⁴⁹⁸ However, there certainly also was a distinct lack of concern with the humanitarian law of war. A 1969 study found that roughly fifty percent of all army personnel in Vietnam had not received their required annual training in the Geneva and Hague Conventions. Guenter Lewy observed that the "pressure for body count and the free use of heavy weapons in populated areas probably made this kind of instruction seem rather academic and irrelevant."⁴⁹⁹ The whole regime of military training discounted the importance of the law of war. Robert Lifton recounts witnessing a lecture given to a group of Marines about to depart for Vietnam. The lecturer held up a rabbit, cracked it in the neck, skinned it, disemboweled it and threw the rabbit's guts out into the audience. According to Lifton, the message of the "rabbit lesson" was clear—kill or be killed.⁵⁰⁰

Officers, in order to protect their men and conceal their own lack of control, invariably failed to report, covered-up or justified the killing of civilians.⁵⁰¹ The filing of such charges by officers was discouraged by the fact that they did not want their reputation sullied, career advancement jeopardized, or loyalty to their fellow officers questioned.⁵⁰² There also was an unwritten code that officers, particularly those who attended West Point, were expected to protect one another.⁵⁰³ In some instances, investigative files of alleged war crimes disappeared within the bowels of the bureaucracy.⁵⁰⁴ In June, 1971, Lieutenant Colonel Anthony B. Hebert, a highly-decorated Vietnam Veteran, took the unprecedented step of lodging war crimes charges against his superior officers. Hebert was aware of the risks involved: It is like ". . . one of the gunmen calling up the head of the Mafia and saying, 'Hey, tomorrow let's all go the police,' or, 'I'd

497. See *Punishment for War Crimes: Duty or Discretion?* *supra* note 391. The most accessible and detailed discussion of the military justice system is General William Westmoreland & Major General George S. Prugh, *Judges In Command: The Judicialized Uniform Code Of Military Justice In Combat*, 3 HARV. J.L. & PUB. POL'Y 1 (1980). See also Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973).

498. See *United States ex. rel. Toth v. Quarles*, 350 U.S. 11 (1950). See generally *O'Callahan v. Parker*, 395 U.S. 258 (1969) (court-martial jurisdiction is limited to service-connected crimes). On the question of military jurisdiction see Jordan J. Paust, *After My Lai: The Case For War Crime Jurisdiction Over Civilians In Federal District Courts* 50 TEX. L. REV. 6 (1971).

499. GUENTER LEWY, *AMERICA IN VIETNAM* 366 (1978).

500. ROBERT JAY LIFTON, *HOME FROM THE WAR VIETNAM VETERANS: NEITHER VICTIMS NOR EXECUTIONERS* 43 (1973).

501. LEWY, *supra* note 399, at 345-47.

502. SEYMOUR M. HERSH, *COVER-UP* 37 (1972).

503. *Id.* at 230. Hersh notes the existence of the so-called West Point Protective Association (WPPA) in Vietnam. *Id.*

504. *Id.* at 218-21.

like to go to the police and talk.' How long do you think that fellow's going to last . . . I mean, really."⁵⁰⁵

The Peers Report on the My Lai massacre discovered that "at every command level from company to division, actions were taken or omitted which together effectively concealed from higher headquarters the events which transpired in T.F. Barker's operation of March 16-19, 1968."⁵⁰⁶ Investigative reporter Seymour Hersh quoted an Episcopalian chaplain assigned to Vietnam who observed that "as far as the United States Army was concerned, there was no such thing as a murder of a Vietnamese civilian."⁵⁰⁷ Hersh found that in those rare cases in which murder, rape, and arson were reported that they were treated as administrative rather than as criminal violations.⁵⁰⁸ Civil affairs officers often were sent to rebuild burned hamlets⁵⁰⁹ or to compensate the victims' families.⁵¹⁰ Despite the requirements of the ROE, Hersh reported that in Calley's Brigade that "murder, rape, and arson were common . . . [m]ost of the infantry companies had gone so far as to informally set up 'zippos' squads, groups of men whose sole mission was to follow the combat troops through hamlets and set them on fire."⁵¹¹ A 1974 survey of generals who served in Vietnam revealed that the ROE were not "very well understood, nor were they carefully adhered to."⁵¹²

Large scale atrocities merely were symptomatic of a general disregard of the humanitarian law of war. The onslaught of armament directed against civilians served to heighten the perception that Vietnamese lives were not deserving of respect.⁵¹³ In 1970, Army Captain Leonard Goldman was convicted of failing to report the death of a female detainee as well as failing to enforce adequate safeguards to protect the detainee.⁵¹⁴ In June 1968, Goldman's company took several prisoners, including two female nurses.⁵¹⁵ The women subsequently were subjected to multiple rapes, sodomy and other mistreatment at the hands of various members of Goldman's company. In the morning, a Lieutenant under Goldman's command handed one of the Viet Cong detainees a rifle and ordered him to

505. *Id.* at 37.

506. PEERS REPORT, *supra* note 401, at 11-1. Despite the ineffectiveness of the system of investigation, the Army refused to permit investigators to monitor the military's compliance with the law of war. LEWY, *supra* note 498, at 349.

507. HERSH, *supra* note 502, at 37 quoting Father Carl E. Creswell.

508. *Id.* at 35.

509. *Id.* at 36.

510. *Id.* at 49. Compensation was roughly thirty-three dollars for each adult and half that total for a child under fifteen. *Id.*

511. HERSH, *supra* note 502, at 34.

512. KINNARD, *supra* note 487, at 54.

513. HERSH, *supra* note 502, at 38.

514. United States v. Goldman, 43 C.M.R. 711, 719 (1970).

515. *Id.* at 713.

shoot one of the nurses. The detainee shot the nurse in the neck and the lieutenant then fired two additional shots into the nurse's head.⁵¹⁶ Goldman was not present, but heard three shots.⁵¹⁷ He was informed following the shooting that "some gink grabbed a rifle and shot one of the nurses."⁵¹⁸ Goldman's only response was to warn his men that if the other female was taken back to headquarters and "tells what happened in the field, we'll all swing for it."⁵¹⁹ It was only after Goldman was confronted two days later by his battalion commander that he admitted that he had failed to report the incident.⁵²⁰ Goldman claimed that the matter was not the type of serious incident which he was required to report to his superiors.⁵²¹ Goldman, who was on his second tour in Vietnam, had received numerous combat awards. He was sentenced to a reprimand and forfeiture of one hundred dollars pay per month for twelve months.⁵²²

Goldman was not an aberration. Army First Lieutenant James B. Duffy ordered several of his platoon to kill a Vietnamese prisoner suspected of being absent without leave from a Viet Cong unit.⁵²³ They shot the prisoner with an M-16 rifle and reported to Duffy that the prisoner had been shot while trying to escape. Duffy relayed this to his company commander. At trial, Duffy explained that the battalion policy stressed the desirability of high body counts and that "shot while trying to escape" was the customary euphemism which was used to indicate that a prisoner had been summarily executed.⁵²⁴ The Court rejected the contention that Duffy could have reasonably believed that battalion policy required the execution of prisoners.⁵²⁵ Duffy also argued that he was forced to kill prisoners or suffer poor efficiency reports for not producing body counts. The Court of Military Review, however, declined to "equate the importance of one man's life with another man's efficiency rating."⁵²⁶ Nevertheless, Duffy only was sentenced to six months confinement and forfeiture of two hundred-and fifty dollars for six months.⁵²⁷

In *United States v. Potter*,⁵²⁸ Marine Private First Class John D. Potter was convicted of rape and murder.⁵²⁹ Potter and others

516. *Id.* at 714.

517. *Id.* at 715.

518. *Id.* at 714.

519. *United States v. Goldman*, 43 C.M.R. 711, 719 (1970).

520. *Id.*

521. *Id.* at 714-15.

522. *Id.* at 719.

523. *United States v. Duffy*, 47 C.M.R. 658, 660 (1973).

524. *Id.* at 661.

525. *Id.* at 663.

526. *Id.* at 664.

527. *Id.* at 660.

528. *United States v. Potter*, 39 C.M.R. 791 (1968).

529. *Id.* at 792.

were ordered to establish an ambush at a hamlet. As they arrived at the hamlet, Potter told the men that they were on their own: "We are to beat up the people, tear up the hooches, rape and kill if necessary."⁵³⁰ The squad inspected a number of houses and then stopped at a house with a bunker. They apprehended two children as well as a younger and older woman.⁵³¹ On the right side of the house four of the soldiers discovered and gang raped another young woman. The four captive Vietnamese then were killed with a burst of fire from a semi-automatic rifle. A grenade was detonated at the site of the killing in order to destroy evidence of the killings. The GI's subsequently shot the rape victim, who miraculously lived to testify against the soldiers.⁵³² The shootings were reported to a lieutenant who ordered the men to return to the hamlet and to rearrange the bodies so as to make it appear that the civilians had been inadvertently killed during a fire fight at the ambush site.⁵³³ Upon returning to the hamlet, the GI's discovered that one of the babies was still alive. Potter pounded and killed the baby with the butt of his rifle.⁵³⁴

In *Crider*,⁵³⁵ Marine Lance Corporal Stephen D. Crider and eight other marines apprehended a young eleven year-old male as well as three young women ranging in age from roughly thirteen to nineteen. The four were tied, gagged and left at an ambush site on the trail. Crider and another soldier took the four to a clearing where they were stabbed and bludgeoned to death.⁵³⁶ Crider later complained that "[t]he gooks are hard to kill with the neck stranglehold."⁵³⁷ He warned the other members of the patrol not to "tell anybody, because if you do we'll all burn."⁵³⁸ Crider's sentence for four counts of premeditated murder ultimately was reduced to confinement for three years at hard labor.⁵³⁹

Those in the military justice system appeared to possess greater understanding and concern for the plight of American GI's than for their Vietnamese victims. In *Potter*, the Court of Military Review emphasized that Vietnam "was a setting where the native civilian friend by day, became by night, a treacherous betrayer, who leads the enemy into the heart of the villages, sometimes concealing him, and sometimes aiding him to sew booby traps and to lay the

530. *Id.* at 793.

531. *Id.* at 793-94.

532. *Id.* at 796-97.

533. *United States v. Potter*, 39 C.M.R. 791 (1968).

534. *Id.* at 801.

535. *United States v. Crider*, 45 C.M.R. 815 (1972).

536. *Id.* at 820.

537. *Id.* at 821.

538. *Id.* at 820.

539. *Id.* at 828.

mine.”⁵⁴⁰ The Court expressed “great sympathy” for marines such as Crider who “lost a ‘buddy’ by reason of such treachery.”⁵⁴¹ The judges also empathized with the dilemma confronting American soldiers. They could repose full trust and faith in a civilian and risk suffering “death as a consequence of perfidy.”⁵⁴² Alternatively, they could treat a civilian as a “foe presumptive” and “deal with them according to the law of self defense.”⁵⁴³ The Court observed that soldiers did not have time to reflect on the proper course: “Action is required. The battlefield is not a debating ground. It is singularly a place for action.”⁵⁴⁴ In *Crider*, despite the uncontroverted evidence that the defendant brutally murdered four Vietnamese juveniles, the eight members of the court martial panel signed a petition urging clemency. Seven of the eight also petitioned that Lance Corporal Crider be retained in the Marine Corps.⁵⁴⁵ The Court of Military Review agreed: “We reach this decision after carefully considering appellant’s exemplary . . . record . . . and . . . the almost unbearable prolonged combat conditions to which he had been exposed and which served to trigger these events.”⁵⁴⁶

Between 1965 and 1975, excluding the My Lai case, only 241 allegations of war crimes were lodged against United States Army personnel. Only fifty of these cases arose prior to the publicity surrounding the My Lai massacre. There was determined to be probable cause to prosecute in only seventy-eight cases and only thirty-six of these were referred to a court-martial.⁵⁴⁷ These thirty-six incidents involved sixty-one men, of whom thirty-one were convicted.⁵⁴⁸ Officers serving on court-martial juries sympathized with the difficulties and frustrations confronting those on trial and were reluctant to convict defendants of the offense with which they were charged.⁵⁴⁹ The instructions of military judges at times also appeared to encourage acquittals.⁵⁵⁰ A total of thirty-two army personnel were convicted of war crimes in Vietnam.⁵⁵¹

It is hardly likely that only thirty-two members of the United

540. 39 C.M.R. at 793.

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. 45 C.M.R. at 828.

546. *Id.* at 828-29.

547. LEWY, *supra* note 499, at 348 (Table 10-1). Each case refers to an incident, which may involve more than one person. *Id.*

548. *Id.* at 350. Figures refer to cases (incidents) which may involve more than one individual. The thirty-six cases leading to court-martial involved sixty-one men, of whom thirty-one were convicted. *Id.*

549. *Id.* at 372.

550. See generally Roger S. Clark, *Medina: An Essay On The Principles Of Criminal Liability For Homicide*, 5 RUT.-CAM. L.J. 59 (1973).

551. LEWY, *supra* note 499, at 350.

States Army in Vietnam were guilty of committing war crimes. The Air Force reported only seven court-martial convictions for war crimes against Vietnamese; the Navy recorded only nine convictions for such offenses.⁵⁵² Ninety marines were convicted and forty-six were acquitted for crimes against Vietnamese.⁵⁵³ Only two marine officers were charged and convicted for filing false reports to cover up murders or failing to report murders.⁵⁵⁴

Army officers convicted of war crimes generally received more lenient treatment than did enlisted men. Fifty-two percent of enlisted men charged with allegations of war crimes were tried by court-martial. Fifty-one percent were convicted. Only thirty percent of officers accused of war crimes were tried by court-martial. Thirty-six percent of these individuals were convicted. Sixty-one percent of the officers were either acquitted, had their charges dismissed before trial, or were only subjected to administrative action. Only thirty-four percent of enlisted men received such treatment.⁵⁵⁵

Those convicted generally received lenient sentences. Between 1967 and 1969, the average sentence for army personnel in Europe and the United States convicted for premeditated murder was twenty-nine years; the average sentence for unpremeditated murder was 12.8 years. Between 1965 and 1970, the average sentence for the premeditated murder of a Vietnamese was sixteen years, while the average sentence for unpremeditated murder was 9.7 years. Gunter Lewy observed that this "meant that the killing of a Vietnamese civilian . . . was seen as a somewhat less grave offense than the unprovoked killing of a German, Frenchman or fellow American in a situation where servicemen did not labor under the severe tension produced by a counterinsurgency war."⁵⁵⁶

Lewy concluded that the sentences "adjudged by courts-martial in Vietnam at times were so light as to eliminate any deterrent effect, and the review process . . . often further undercut this important purpose of punishment."⁵⁵⁷ Prisoners were often released on parole after serving only a small portion of their sentences. The command structures of the military services also used their discretion to grant clemency. Twenty-seven marines were convicted of murdering Vietnamese. The average sentence served by the twelve

552. *Id.* at 350.

553. *Id.* at 456 (Table 10-2). The Marines Corps statistics for homicide combined war crimes with ordinary offenses such as off-duty assaults and vehicular homicide. As a result, their data is a bit misleading. *Id.* at 351.

554. *Id.* at 456 (Table 10-2).

555. LEWY, *supra* note 499, at 352. Officers are tried by courts composed of officers while enlisted men generally are not tried before a jury of their peers (they may request that one-third of their jury is composed of enlisted men). *Id.*

556. *Id.* at 352-53.

557. *Id.* at 370.

marines sentenced to confinement at hard labor for life was 6½ years. In only four of the twenty-seven cases, all involving sentences of five years or less, did the defendants serve their full sentence.⁵⁵⁸ As of May 21, 1971, twenty-nine army personnel had been convicted of war crimes in Vietnam, fifteen of whom were sentenced to confinement. Data available for thirteen of these men indicate that, on average, they served 51.5 percent of each sentence before being released as a result of parole or clemency action.⁵⁵⁹

The prosecutions growing out of the My Lai massacre illustrate that even the most well-publicized and documented war crime did not result in the application of severe criminal punishments. In March 1971, First Lieutenant William Calley was found guilty of three counts of the premeditated murder of not less than twenty-two unarmed Vietnamese civilians and of assault with intent to commit the murder of a young Vietnamese child. Two days later he was sentenced to life imprisonment at hard labor. The evidence established that Calley had directed and killed a number of unarmed and helpless men, women and children.⁵⁶⁰ The Secretary of the Army reduced the sentence to ten years and Calley ultimately was paroled effective November 1974.⁵⁶¹

The Pentagon inquiry had listed thirty individuals as implicated in criminal offenses related to the My Lai operation. Charges were brought against sixteen of these individuals and five were court-martialed. Only Calley was convicted. All other charges were dismissed. General William R. Peers who conducted the military inquiry into My Lai remarked that the My Lai massacre was "a horrible thing, and we find we have only one man finally convicted and he's set free after doing a relatively small part of his sentence."⁵⁶² Calley is not an isolated example.

Before Lt. Calley was convicted, 24 other Americans had been convicted for premeditated murder. In every previous case, the sentences were reduced drastically on appeal. The longest was set at 35 years; almost all the others were set at 5 to 10 years Staff Sergeant Walter Griffen who was charged with premeditated murder of a suspected Viet Cong prisoner in 1967. Griffen admitted shooting the prisoner but argued that he had done so under orders. He was convicted only of unpremeditated murder, sentenced to 10 years in prison, which was reduced to 7 years by the commanding general, then knocked down to two years by the board of review, and he was returned to duty in

558. *Id.*

559. LEWY, *supra* note 499, at 371.

560. *Id.* at 356.

561. *Id.* at 358.

562. *Id.* quoting General William R. Peers.

December of 1968, after having been imprisoned for only 17 months.⁵⁶³

The military portrayed those war crimes which came to public attention as an exception—the product of stress and psychological dislocation. The United States military leadership confidently asserted that American troops scrupulously adhered to the law of war.⁵⁶⁴ General William C. Westmoreland, commander of United States forces in Vietnam, pointed out that although his troops were “armed and operating in a hostile environment,” that the “remarkable fact may well be not that crimes occurred but that they were as few as they were.”⁵⁶⁵ He proudly observed that “[d]uring my tenure in Vietnam, thirty-one men were tried for murder of civilians, seventeen for rape, and eleven for manslaughter. Of the total of fifty-nine, thirty-six were convicted, a conviction rate, above the average for American civilian juries.”⁵⁶⁶ Westmoreland conceded that over the years, a number of other “battlefield irregularities” had been reported or alleged.⁵⁶⁷ However, he asserted that most, particularly those leveled by individuals testifying under the aegis of groups critical of the war, were “backed by no responsible evidence.”⁵⁶⁸ Westmoreland specifically addressed the contention that high body counts, combined with the low number of weapons collected, should have alerted the American command to a pattern of war crimes. He countered that the “guerrillas were adept at disposing of weapons in paddies or canals and many guerrillas often were armed only with grenades and explosives.”⁵⁶⁹ To the extent that various excesses occurred, Westmoreland attributed them to the Congressional policy of granting deferments to college students which forced the army to reduce its standards for officers.⁵⁷⁰

C. *Those At The Top: The Failure To Prosecute Political Leaders*

Contrary to Westmoreland's contentions, the United States civilian and military leadership were well aware that American military tactics were responsible for a massive number of civilian casual-

563. *Procedures for Protection of Civilians and Prisoners of War in Armed Conflicts: Southeast Asian Examples*, 65 PROC. AM. SOC'Y INT'L L. 209, 222-23 (1971) (Comments of Jon M. Van Dyke).

564. See GLORIA EMERSON, WINNERS AND LOSERS BATTLES, RETREATS, GAINS, LOSSES AND RUINS FROM THE VIETNAM WAR 213-16 (1972) (detailing the lack of interest in an allegation of war crimes made by a former American soldier who served in Vietnam).

565. GENERAL WILLIAM WESTMORELAND, A SOLDIER REPORTS 378 (1976).

566. *Id.*

567. *Id.* at 501.

568. *Id.*

569. *Id.* at 500.

570. GENERAL WILLIAM WESTMORELAND, A SOLDIER REPORTS 498-99 (1976).

ties.⁵⁷¹ They mechanically totalled "kill-ratios" and calculated the number of American and Vietnamese lives which would have to be expended to win the war.⁵⁷²

President Johnson and his advisers were closely involved in designing strategies and tactics and met on a weekly basis to select targets.⁵⁷³ They strained to formulate legal justifications for their aggressive bombing policy. Daily and weekly summaries of Viet Cong assassinations and kidnappings were compiled to portray American bombing as a "policy of sustained reprisal against North Vietnam."⁵⁷⁴ Their military strategy was based on a "hopelessly oversimplified derivative of . . . rat psychology . . . [i]f you want to motivate a rat, give him a pellet or shock him with a bolt of electricity."⁵⁷⁵ They believed that once the "screw" was "twisted," the North Vietnamese would feel "pain" and abandon the struggle.⁵⁷⁶ Daniel Ellsberg, who before turning against the war, was a high-level presidential adviser, reported that the "situation that I entered in mid-1964--as it looks to me now--amounted to a conspiracy: The officials who became my colleagues were concerting, in secrecy, to plan and, ultimately, to wage aggressive war against North Vietnam."⁵⁷⁷ American decision-makers were well-aware that the deployment of sophisticated technology against an indigenous popular revolt in a third world country would inevitably result in civilian deaths. The best that can be said is that they chose to remain ignorant concerning the extent of civilian casualties.⁵⁷⁸ Telford Taylor argued that it is improbable that the American leadership was "blind to the probable consequences to civilians of a massive employment of American troops in Vietnam to engage in counterinsurgency operations."⁵⁷⁹ Francis FitzGerald observed: "charges of war crimes against the American civilian and military authorities who directed the war have a certain validity [T]he U.S. command's decision to use certain weapons and certain strategies insured that the number of civilian deaths would be sizable."⁵⁸⁰ Vietnam, in the words

571. SHEEHAN, *supra* note 463, at 620-21.

572. *Id.* at 569, 630. The war was based on a "kill-ratio" of one American or Saigon soldier for every 2.6 Viet Cong or North Vietnamese killed. *Id.* at 630.

573. DANIEL ELLSBERG, *The Responsibility Of Officials In A Criminal War*, in *PAPERS ON THE WAR* 289, 312-13 (1972).

574. *Id.* at 312 n.20.

575. RICHARD J. BARNET, *ROOTS OF WAR* 99 (1971) (Barnet was a former member of the Department of State and a Defense Department consultant).

576. *Id.* at 105.

577. ELLSBERG, *supra* note 573, at 311.

578. *Id.* at 316-20.

579. TAYLOR, *supra* note 407, at 172. Taylor notes that communications and mobility in Vietnam generally were "rapid and efficient" and that the military leadership was able to keep abreast of battlefield developments. *Id.* at 181.

580. FITZGERALD, *supra* note 48, at 500.

of Robert Lifton, was an "atrocious-producing situation."⁵⁸¹ Lifton characterized American military strategy as "inevitably genocidal."⁵⁸²

[A] counterinsurgency war undertaken by an advanced industrial society against a revolutionary movement of an underdeveloped country, in which the revolutionary guerrillas are inseparable from the rest of the population. Those elements in turn contribute greatly to the draconian American military policies in Vietnam: the "free-fire zone" (where every civilian is a target), and the "search-and-destroy mission" (on which everyone and everything can be killed, or as the expression has it, "wasted"); the extensive use of plant defoliants that not only destroy the overall ecology . . . but, if encountered in sufficient concentration by pregnant women, human embryos as well; and the almost random saturation of a small country with an unprecedented level of technological destruction and firepower both from the air and on the ground. These external historical factors and military policies lead, in turn, to a compelling internal sequence that constitutes the psychological or experiential dimension of the atrocious-producing situation.⁵⁸³

A series of American civilian and military leaders either ordered or knew of war crimes and stood mute. As early as 1966, Representative Clement Zablocki of Wisconsin, a leading supporter of the war, reported to the House Foreign Affairs Committee that an average of two civilians had been killed for every Viet Cong and, more recently, that the ratio had been six civilians for every enemy soldier slain.⁵⁸⁴ Ambassador Henry Cabot Lodge, in a commentary on Zablocki's report approved by General William Westmoreland, explained that the United States' reliance on high technology weapons made civilian casualties inevitable. Lodge argued that too restrictive a policy on the use of such weapons might compromise the United States' military superiority. He advocated a public relations effort to impress on the public and Congress that the inordinate number of civilian casualties resulted from the Viet Cong's use of civilians to carry out military attacks. Lodge urged officials to stress that the Viet Cong's deliberate attacks on civilians were much more cruel and morally reprehensible than those inadvertently caused by the Allied forces.⁵⁸⁵

The discussion in the White House often was frighteningly candid and callous. A memo from John T. McNaughton in 1966, ar-

581. LIFTON, *supra* note 500, at 41.

582. *Id.*

583. *Id.*

584. KAHIN, *supra* note 36, at 403.

585. KAHIN, *supra* note 36, at 403-04.

gued against bombing "population targets."⁵⁸⁶ McNaughton contended that this would be "counterproductive," embolden the North Vietnamese and risk drawing China and the Soviet Union into the war.⁵⁸⁷ On the other hand, McNaughton contended that the destruction of locks and dams should be considered: "Such destruction does not kill or drown people. By shallow-flooding the rice, it leads after time to widespread starvation (more than a million?) unless food is provided--which we could offer to do 'at the conference table.'"⁵⁸⁸ Richard Barnet noted that any White House adviser who would have objected to the killing of Vietnamese would have been dismissed as a flaccid idealist. As a result, those opposed to the escalation "never raised the issue that 'taking out' great areas of Vietnam, a euphemism for killing large numbers of Vietnamese, was wrong. Their arguments were invariably pragmatic--bombing doesn't work, don't get bogged down in a land war in Asia . . . or . . . keep the victim alive for later."⁵⁸⁹

Ellsberg reluctantly reached the conclusion that our "humane" and "liberal" leaders were waging a war involving the deliberate "burning of villages; herbicides; defoliation; torture: the creation of millions of refugees; air and ground invasions; and the dropping of over six million tons . . . of explosives from the air, and another six million tons of artillery shells, on the people of Indochina."⁵⁹⁰ The White House memos on the American bombing program advocated ominous sounding strategies such as the "'water-drip technique' . . . 'hot-cold' treatment . . . painful surgical strikes . . . 'salami-slice' bombing . . . [and] one more turn of the screw."⁵⁹¹ Richard Barnet observed that this "verbal camouflage"⁵⁹² permitted decision-makers to avoid confronting the fact that what they were advocating inevitably would lead to "flaming children, torn limbs, or shattered bodies pinned under rubble . . . [that] mutilated, weeping, and dazed human beings . . . will be the actual target of the bombs."⁵⁹³ Daniel Ellsberg reported that only later did he come to appreciate that these

586. ELLSBERG, *supra* note 573, at 309.

587. *Id.*

588. *Id.*

589. BARNET, *supra* note 575, at 111.

590. ELLSBERG, *supra* note 573, at 293.

591. *Id.* at 319.

592. BARNET, *supra* note 575, at 129.

593. *Id.* at 129-30.

Pacification trips off the tongue far more easily in a Pentagon briefing and looks better on the page of a neat memorandum than phrases that would actually describe the death and suffering to which the antiseptic term refers. Emotional distance from the homicidal consequences of his planning is essential to the mental health of the planner and bureaucratic language is rich in the terminology of obfuscation.

Id. at 130.

seemingly innocent phrases were the "*the language of torturers*."⁵⁹⁴

When confronted with the consequences of United States actions, White House decision-makers strained to deny the impact of their policies. They responded to the fact that churches and pagodas were being systematically bombed by explaining that the structures were being used by the enemy to store trucks.⁵⁹⁵ It was noted that herbicides could not possibly be harming civilians since the only individuals in the jungles were Viet Cong.⁵⁹⁶ In the end, between 1965 and 1975, it is estimated that the war resulted in roughly 1,800,000 civilian casualties in the South; over ten million refugees; 83,000 amputees; 8,000 paraplegics; 30,000 blind; 10,000 deaf; and 50,000 disabled individuals.⁵⁹⁷ The South was overwhelmed by malaria, bubonic plague, leprosy, tuberculosis, and venereal disease. Inestimable damage also was created by the dropping of half a million tons of toxic chemicals, 7,000 tons of toxic gas, and 7,600,000 tons of bombs.⁵⁹⁸ Yet, no high-level American civilian or military official was prosecuted for war crimes in Vietnam. Were these individuals immune from international legal liability? Were only those in the field who actually pulled the trigger or pushed the button legally responsible?

It is well established that civilian and military leaders are criminally responsible for violations of the law of war under international law. The International Military Tribunal at Nuremberg convicted sixteen of the eighteen Nazi leaders indicted for war crimes and for crimes against humanity. Twelve were sentenced to death, two received life imprisonment, and four were sentenced to between ten and twenty years in prison.⁵⁹⁹ The Tribunal ruled that individuals have international duties which transcend the national obligations demanded by the individual state. The international panel pronounced that those who fail to heed these responsibilities and violate the dictates of international law will be held internationally liable for transgressions, regardless of their rank or status. The Tribunal explained that crimes against international law are "committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁶⁰⁰ The Nuremberg panel also ruled that the fact that an

594. ELLSBERG, *supra* note 573, at 320.

595. BARNET, *supra* note 574, at 128.

596. *Id.* at 127.

597. EMERSON, *supra* note 564, at 357.

598. *Id.* at 358.

599. See D'Amato, Gould & Woods, *supra* note 396, at 1062 (The verdicts are conveniently arrayed in a table). Four defendants were only indicted for Crimes Against Peace. *Id.* For a discussion of crimes against peace and Vietnam, see Benjamin B. Ferencz, *War Crimes Law And The Vietnam War*, 17 AM. U. L. REV. 403 (1968).

600. XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILI-

individual who violated the law of war acted pursuant to superior orders does not provide a defense. The existence of such orders may be considered in mitigation of punishment in circumstances in which no "moral choice was in fact possible."⁶⁰¹

The Third Reich, of course, compiled a record of unequaled horrors. Nevertheless, the Tribunal's general discussion of the Nazis' crimes anticipated the type of horrors perpetrated by the Americans in Vietnam.⁶⁰² The Nuremberg panel sketched the impact of the "Nazi conception of 'total war.'"⁶⁰³

Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported . . . Cities and towns and villages were wantonly destroyed without military justification or necessity.⁶⁰⁴

German civilian and military leaders were held criminally liable for planning or ordering the commission of war crimes or for implementing such orders.⁶⁰⁵ As British prosecutor Sir Hartley Shawcross observed, "[t]hese were the men in the inner councils, the men who planned as well as carried out; of all people the ones who might have advised, restrained, halted Hitler instead of encouraging him in his

TARY TRIBUNAL 466 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

601. *Id.*

602. The Nuremberg Charter defined war crimes:

(b) War crimes: Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities towns or villages, or devastation not justified by military necessity.

Agreement for the prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 284, *reprinted in* 39 AM. J. INT'L L. 258 (Supp. 1943) art. 6(a) [hereinafter Nuremberg Charter] *cited in* Matthew Lippman, *Reflections On Non-Violent Resistance And The Necessity Defense*, 11 HOUS. J. INT'L L. 277, 284 n.60.

The Tribunal did not distinguish between war crimes and crimes against humanity. *See* Trial Of The Major War Criminals, *supra* note 545, at 498. The Nuremberg Charter defined crimes against humanity:

(c) Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Nuremberg Charter, *supra* note 602, at 6(c).

603. Trial Of The Major War Criminals, *supra* note 600, at 469.

604. *Id.* at 470.

605. *See id.* at 524, 526-7 (liability of Goring for war crimes and crimes against humanity); 530, 532-3 (liability of Von Ribbentrop for war crimes and crimes against humanity); 533, 534-6 (liability of Keitel for war crimes and crimes against humanity).

satanic courses.”⁶⁰⁶ Sir Hartley concluded,

there comes a time when a man must choose between his conscience and his leader. No one who chooses, as these men did, to abdicate their consciences in favor of this monster of their own creation can complain now if they are held responsible for complicity in what their monster did.⁶⁰⁷

The Nuremberg precedent was not intended to be limited to the German leaders. Robert H. Jackson, United States prosecutor at Nuremberg, in his opening statement proclaimed:

[W]hile this law is first applied against German aggressors, the law . . . if it is to serve a useful purpose . . . must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. Application of this standard would have resulted in the criminal punishment of those involved in designing and implementing of policies such as free fire zones.⁶⁰⁸

In *United States v. List*,⁶⁰⁹ various members of the German military were convicted of war crimes.⁶¹⁰ The Court stressed the importance of punishing those responsible for such offenses:

Unless civilization is to give way to barbarism in the conduct of war, crime must be punished If all war criminals are not brought to the bar of justice under present procedures, such procedures should be made more inclusive and more effective. If the laws of war are to have any beneficent effect, they must be enforced.⁶¹¹

The scope of command responsibility was further refined and broadened by the United States Supreme Court in *In Re Yamashita*.⁶¹² Yamashita was military governor of the Philippines as well as commander of the Japanese forces.⁶¹³ As American troops invaded the Philippines, the retreating Japanese troops allegedly devastated and destroyed property and brutally mistreated and killed more than twenty-five thousand civilians.⁶¹⁴ An American military

606. XIX TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 545, at 466.

607. *Id.* at 515.

608. II TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 545, at 154.

609. *United States v. List*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1230 (American Mil. Trib. Nuremberg, Germany 1948) [hereinafter Hostage Case].

610. *Id.* at 1318-19.

611. *Id.* at 1254.

612. *In Re Yamashita*, 327 U.S. 1 (1945).

613. *Id.* at 16.

614. *Id.* at 14.

commission convicted Yamashita of unlawfully disregarding and failing to discharge his duty as commander of Japanese forces to "control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes."⁶¹⁵

The Supreme Court, in affirming Yamashita's conviction, explained that a military commander is obligated to insure that his or her troops abide by the law of war. A commander who fails to properly supervise the actions of his troops is vicariously responsible for their transgressions. Thus, an officer is legally required to take "such appropriate measures as are within his power to control the troops under his command."⁶¹⁶ The Court thus concluded that Yamashita was properly convicted of a "breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities."⁶¹⁷

The Tokyo War Crimes Trial ruled in 1948, that civilian officials, like their military counterparts, possessed an affirmative duty to take reasonable steps to prevent the commission of those war crimes of which they were or reasonably should have been aware. On December 13, 1937, Japanese troops pushed back the Chinese forces and entered Nanking. The invading troops roamed the city--murdering, raping, looting and burning.⁶¹⁸ Over 200,000 civilians and prisoners of war were murdered in the city and outskirts of Nanking during the first six weeks of Japanese occupation⁶¹⁹ and there were 20,000 cases of rape during the first month.⁶²⁰ Koki Hirota served as Japanese Foreign Minister during the so-called "rape of Nanking" and later was elevated to Prime Minister.⁶²¹ The Tokyo Tribunal determined that Hirota had received reports of atrocities immediately after the entry of the Japanese forces into Nanking. The War Ministry assured Hirota that such atrocities would be halted. However, the Tribunal found that Hirota continued to receive reports of atrocities and chose to remain silent. The Tribunal concluded that Hirota had been guilty of criminal negligence in failing to intervene to halt the atrocities in Nanking.⁶²²

Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the

615. *Id.*

616. *Id.* at 15.

617. *In re Yamashita*, 327 U.S. at 17.

618. *International Military Tribunal For The Far East, The Tokyo War Crimes Trial* (November 1948) in VOLUME II: THE LAW OF WAR A DOCUMENTARY HISTORY 1039, 1061 (Leon Friedman ed. 1972) [hereinafter *International Military Tribunal*].

619. *Id.* at 1062.

620. *Id.* at 1061.

621. *Id.* at 1132.

622. *Id.* at 1134.

same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were committed daily. His inaction amounted to criminal negligence.⁶²³

The Tokyo Tribunal broadly interpreted the scope of the responsibility of civilian officials. It ruled that any member of the Cabinet who has knowledge of war crimes and who elects to continue as a member of the government may be charged with personal liability. This is the case even if the Minister does not have administrative responsibilities relating to the conduct of the war. Such an individual, in the words of the Tribunal, "willingly assumes responsibility for any ill-treatment in the future."⁶²⁴

A high-echelon official cannot escape criminal liability by remaining in the government in order to exert some moderating influence on governmental policy. Between April 1938 and the spring of 1943, Ernst von Weizaecker was State Secretary of the German Foreign Ministry. Only von Ribbentrop (who was convicted and sentenced to death at Nuremberg) outranked von Weizaecker in terms of responsibility for the conduct of foreign affairs.⁶²⁵ von Weizaecker was aware of Hitler's plans for repression against the civilian populations of occupied countries. He claimed to have possessed "mental reservations and objections" concerning many of the directives ordering the deportation of Jews which passed over his desk. However, he generally did not articulate his protests.⁶²⁶ von Weizaecker explained that he desired to remain in office in order to provide information to the underground opposition to Hitler and to be in a position to initiate or aid in attempts to negotiate peace. He also hoped to moderate the Nazi's excesses. Nevertheless, the Court

623. *International Military Tribunal*, *supra* note 618, at 1134.

624. *Id.* at 1039. The Tribunal broadly interpreted the knowledge requirement:

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge. If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

Id. at 1039.

625. THE MINISTRIES CASE, XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 314, 340 (1949) [hereinafter *The Ministries Case*].

626. *Id.* at 497.

noted that while von Weizsaecker's private opposition might be considered a mitigating factor, it cannot constitute a defense to charges of war crimes or crimes against humanity.⁶²⁷ The Court proclaimed that "[o]ne cannot give consent to or implement the commission of murder because by so doing, he hopes eventually to be able to rid society of the chief murderer. The first is a crime of imminent actuality; the second is but a future hope."⁶²⁸

The principles governing individual liability are of more than academic importance. The Army Field Manual, which provides "authoritative guidance" to military personnel,⁶²⁹ incorporates the Nuremberg Principles.⁶³⁰ Paragraph 498 punishes members of the armed forces and civilians who commit the Nuremberg offenses of Crimes against humanity and war crimes.⁶³¹ Paragraph 500 punishes conspiracy, direct incitement, and attempts to commit as well as complicity in the commission of crimes against humanity and war crimes.⁶³² Paragraph 509 establishes the fact that an individual acted pursuant to superior orders does not constitute a defense to the commission of a war crime.⁶³³ Paragraph 501 directly incorporates the *Yamashita* standard.

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violation thereof.⁶³⁴

Paragraph 510 emphasizes that the standards set forth in the Field

627. *Id.*

628. *Id.* at 497-98. The Tribunal queried "[h]ow a decent man could continue to hold officer under a regime which carried out planned and wholesale barbarities of this kind is difficult to understand." *Id.* at 472.

629. Army Field Manual, *supra* note 399, at 184, para. 1.

630. *Id.* at 189, para. 498.

631. *Id.* Crimes against peace also are punishable. *Id.* Paragraph 499 defines a war crime as a "violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime. *Id.* at para. 499, 189.

632. *Id.* at 189, at para. 500.

633. Army Field Manual, *supra* note 399, at 190, para. 509.

634. *Id.* at 190, para. 501.

Manual are applicable to both high-level and lower echelon officials. It states that the fact that a "person who committed an act which constitutes a war crime acted as the head of a state or as a responsible government official does not relieve him from responsibility for his act."⁶³⁵ Commanding officers of United States troops are required to "insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished."⁶³⁶ The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. Such penalties should be sufficiently severe to deter future violations and the death penalty may be imposed for grave breaches of the law.⁶³⁷

Thus, those high-echelon civilian and military leaders involved in the planning and prosecution of the Vietnam War who were aware of (or should have been aware of) war crimes were subject to punishment. Justice Murphy, dissenting in *Yamashita*, prophetically noted that "the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision."⁶³⁸ It must be remembered that the Germans convicted of war crimes by post World War II trials, like the American leadership during the Vietnam War, were people of culture and education who were held in high esteem. A post World War II American military tribunal noted in *United States v. Ohlendorf*,⁶³⁹ that the defendants were not "untutored aborigines incapable of appreciation of the finer values of life and living. Each man at the bar has had the benefit of considerable schooling It was indeed one of the many remarkable aspects of this trial that the discussions of enormous atrocities was constantly interspersed with the academic titles of the persons mentioned as their perpetrators."⁶⁴⁰

Of course, the military strategies adopted by the American leadership were considered to be necessary to combat a guerilla insurgency. However, as observed in *Ohlendorf*, this type of conception of military necessity would permit "any belligerent who is hard pressed . . . unilaterally to abrogate the laws and customs of war [W]ith such facile disregarding of restrictions, the rules of war would quickly disappear Every belligerent could find a reason to assume that it had higher interests to protect."⁶⁴¹ The United States Army Field Manual clearly states that military neces-

635. *Id.* at 192, para. 510.

636. *Id.* at 191-2, para. 507.

637. *Id.* at 192, at para. 508.

638. *In Re Yamashita*, 327 U.S. at 28.

639. *United States v. Ohlendorf*, IV TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 411 (1948) (Einsatzgruppen case).

640. *Id.* at 500.

641. *Id.* at 463.

sity does not permit the direct violation of the humanitarian law of war. Such rules have been developed and framed with consideration for the concept of military necessity.⁶⁴²

Military necessity only permits the incidental damaging of civilian structures and injury to civilians during the course of an otherwise lawful military operation. As observed in *United States v. Wilhelm List*,⁶⁴³ this destruction must be "imperatively demanded by the necessities of war."⁶⁴⁴ Destruction "as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone."⁶⁴⁵ As observed in *United States v. von Leeb*,⁶⁴⁶ an expansive interpretation of necessity "would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations."⁶⁴⁷ Clearly, the considered and deliberate deployment of high technology weapons and the indiscriminate targeting of civilian hamlets cannot be justified under military necessity. Much of the destruction in Vietnam was an end itself rather than incidental to some larger objective. This needless injury and killing of civilians also certainly was disproportionate to any possible military advantage or objective which the American leadership was attempting to attain.⁶⁴⁸

American military tactics also cannot be justified as reprisals. Reprisals are illegal actions undertaken in response to a belligerent's transgressions which are intended to deter the enemy's continuing violations of the law of war.⁶⁴⁹ In *List*, the American military tribunal observed that it is a "fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct. Where an excess is knowingly indulged, it in turn is criminal and may be punished."⁶⁵⁰ Telford Taylor noted that the United States engaged in "[r]eprisal bombing attacks on villages" which "have driven

642. Army Field Manual, *supra* note 399, at 185, para. 3(a).

643. *United States v. Wilhelm List*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10 1230 (1950) (The Hostage Case).

644. *Id.* at 1253.

645. *Id.* at 1253-54.

646. *United States v. von Leeb*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 462 (1949) (hereinafter *The High Command Case*).

647. *Id.* at 541.

648. TAYLOR, *supra* note 407, at 143 (necessity embodies the principle of proportionality).

649. *Id.* at 53-54.

650. *United States v. Wilhelm List*, *supra* note 643 at 1248-49.

thousands of inhabitants to refugee camps, and subjected those who stay to a fear-ridden existence."⁶⁵¹ In *List*, the Tribunal admonished that "members of the population of one community cannot properly be shot in reprisal for an act against the occupation forces committed at some other place."⁶⁵² It also is a "fundamental rule of justice that the lives of persons may not be arbitrarily taken."⁶⁵³ Such killings only may be undertaken pursuant to a judicial determination that such persons were responsible for the violation of the laws of war. The only exception is where an immediate reprisal is required to deter the enemy from violating the law of war.⁶⁵⁴ Excessive "reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission."⁶⁵⁵ The targeting of entire hamlets, even in cases in which the villagers were suspected of harboring or assisting the Viet Cong or having fired on American troops, constituted an unduly severe and collective penalty in violation of the laws of war.⁶⁵⁶

In summary, American high-echelon civilian and military leaders were subject to prosecution for their role in planning and implementing war crimes in Vietnam. Many of their military tactics were reminiscent of those carried out by Nazi leaders during World War II. However, high-echelon American officials, like most of those in the field, were not held legally accountable for their actions. After all, men of such achievement could not possibly be compared to the monsters who had been convicted at Nuremberg. As Townsend Hoopes warned, such "shockingly glib"⁶⁵⁷ war crimes allegations only will lead to a "new McCarthyism and to anarchy."⁶⁵⁸ He cautioned that Americans should avoid the "destructive and childish pleasure of branding as deliberate criminals duly elected and appointed leaders who . . . are struggling in good conscience to uphold the Constitution and to serve to broad national interest according to their lights."⁶⁵⁹ The vast majority of Americans, of course, agreed with Hoopes and did not believe that United States troops or leaders should be prosecuted for even the most flagrant violations of the law of war.⁶⁶⁰ At the same time, there was little tolerance for those who

651. TAYLOR, *supra* note 407, at 195.

652. United States v. Wilhelm List, *supra* note 643, at 1252.

653. *Id.*

654. *Id.* at 1253.

655. *Id.*

656. See Geneva IV, *supra* note 390, at art. 33.

657. Hoopes, *supra* note 489, at 236.

658. *Id.* at 235.

659. *Id.* at 237.

660. See generally Herbert C. Kelman & Lee H. Lawrence, *Assignment of Responsibility in the Case of Lt. Calley: Preliminary Report on a National Survey*, 28 J. SOC. ISSUES 177 (1972).

protested or refused to serve in the war.⁶⁶¹ Vice-President Spiro Agnew seemed to capture the public mood when he observed in 1970, that "as for these deserters, malcontents, radicals, incendiaries, the civil and the uncivil disobedients among our youth . . . I would swap the whole damn zoo for a single platoon of the kind of young Americans I saw in Vietnam."⁶⁶²

D. Dissenters: The Prosecution Of Protesters Against War Crimes

Opposition against the war was intense. In 1965, a number of pacifist organizations issued a *Declaration Of Conscience Against The War In Vietnam*⁶⁶³ in which they declared their conscientious refusal to cooperate with the United States government in the prosecution of the Vietnam War.⁶⁶⁴ Thousands signed *A Call To Resist Illegitimate Authority*⁶⁶⁵ which was issued in 1967 and pledged to "exert every effort to end the war, to avoid collusion with it, and to encourage others to do the same."⁶⁶⁶ It is ironic that while few prosecutions were brought against those who committed war crimes in Vietnam, over ten thousand were brought to trial for draft-related charges. Over eight thousand were convicted, and four thousand were sentenced to prison.⁶⁶⁷ The average prison sentence handed out to draft offenders in 1968-69 was three years—a harsher sentence than was meted out to draft evaders during World War II or Korea.⁶⁶⁸ Forty-six of the fifty-four draft offenders convicted in Milwaukee in 1970 were sentenced to prison terms.⁶⁶⁹

A number of those in the military who resisted service in Vietnam argued their refusal was a justifiable effort to avoid liability under the Nuremberg Principles. Captain Doctor Howard Levy was convicted of willfully disobeying a lawful command of his superior officer, uttering public statements designed to promote disloyalty and disaffection, and making disrespectful and disloyal statements to enlisted personnel.⁶⁷⁰ Levy refused to train Special Forces aidmen in dermatology. He asserted that Special Forces personnel, including aidmen, were involved in war crimes in Vietnam and that the act of training these men would constitute complicity in such crimes. Levy

661. See generally *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

662. Quoted in Lifton, *supra* note 500, at 370.

663. *Declaration Of Conscience Against The War In Vietnam*, in *CIVIL DISOBEDIENCE THEORY AND PRACTICE* 160 (Hugo Adam Bedau ed. 1969).

664. *Id.*

665. *A Call To Resist Illegitimate Authority* in *id.* at 162.

666. *Id.* at 163.

667. LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, *CHANCE AND CIRCUMSTANCE THE DRAFT, THE WAR AND THE VIETNAM GENERATION* 69 (1979) (Figure 4).

668. *Id.* at 79.

669. *Id.* at 80. As protest mounted, it was customary to drop draft-related charges. *Id.* at 80-1.

670. *Levy v. Parker*, 478 F.2d 772, 776, 778 (1st Cir. 1973), *rev'd* 417 U.S. 733 (1974).

also alleged that providing medical training to these personnel would violate his Hippocratic Oath.⁶⁷¹ In 1973, the First Circuit Court of Appeals ruled that there was no evidence that the Special Forces had systematically engaged in war crimes and rejected Levy's contention:

At best, appellant could establish that individual American personnel may have violated the law of war in Vietnam. However, there never was any showing that the medical training appellant was ordered to give had any connection whatsoever with the perpetration of any war crime. Thus, appellant failed to demonstrate how the existence of war crimes committed by individuals other than those he was ordered to train was relevant to his failure to obey the order. Particularly relevant in this is that he failed to show that Special Forces aidmen as a group engaged systematically in the commission of war crimes by prostituting their medical training.⁶⁷²

In *Switkes v. Laird*,⁶⁷³ Switkes, a psychiatrist, sought immediate discharge from the armed forces or, in the alternative a judicial order enjoining him from being compelled to report to Vietnam.⁶⁷⁴ Switkes contended that the Indochinese War was being prosecuted in violation of international law. He specifically cited the indiscriminate killing of noncombatants, the use of chemical warfare, the violations of the rights of prisoners of war, pillage, denial of medical care for enemy wounded, saturation bombing of populated areas, and destruction of agricultural land. Switkes argued that if he was transported to Vietnam that he "[would] be required to engage in, and become an accomplice to, war crimes."⁶⁷⁵ Switkes alleged that there would be no practical and effective way to raise the law crimes issue once he was transported to Vietnam.⁶⁷⁶

The Court ruled that it was unnecessary to address Switkes' contentions.

[E]ven if they were decided in favor of Switkes, he would not be entitled to a preliminary injunction since there is no showing of any damage to him. The damage claimed is that he will become

671. *Id.* at 797. The law officer heard evidence outside the presence of the members of the court-martial on the question of war crimes in Vietnam. He ruled:

[A]lthough there perhaps occurred instances of needless brutality in the Vietnam War, nevertheless, there was "no evidence that would render this order to train aidmen illegal on the grounds that eventually these men would become engaged in war crimes or in some other way prostitute their medical training by employing it in crimes against humanity.

Id. Levy's anti-war statements and views are recorded in *id.* at 778-79 n.1.

672. *Id.* at 797.

673. *Switkes v. Laird*, 316 F. Supp. 358 (S.D.N.Y. 1970).

674. *Id.* at 360.

675. *Id.* at 365.

676. *Id.*

a war criminal. This is so unlikely as to require rejection of his claim. If he were a combat soldier or combat officer, the matter would stand differently. Switkes, however, is a medical officer specializing in psychiatry.

If war crimes are being committed in Indochina, not every member of the armed forces there is an accomplice to those crimes.⁶⁷⁷

Thus, the federal courts of appeals ruled that neither Levy nor Switkes was able to demonstrate that he would be implicated in war crimes. Neither training military personnel nor mere service in Vietnam was considered sufficient to constitute criminal liability. Some argued that the courts had adopted an overly narrow interpretation of the evolving requirements of the Nuremberg judgment. It was pointed out that "in a higher sense, the Nuremberg law implicitly approves and demands efforts not to participate in objectively illegal acts, even by individuals who would not be personally punishable because they would commit them under pressures."⁶⁷⁸ Under such a broad interpretation, the involvement of both Levy and Switkes in supporting the military effort in Vietnam might be viewed as constituting "complicity" in the commission of war crimes.⁶⁷⁹

A number of individuals outside the military were morally compelled to protest war crimes and engaged in acts of civil disobedience. Courts uniformly rejected claims that these actions were legally justified.⁶⁸⁰ In *United States v. O'Brien*,⁶⁸¹ O'Brien and three companions burned their Selective Service registration certificates to vividly proclaim their opposition to the war and to influence others to reevaluate their positions.⁶⁸² The Court rejected O'Brien's claim that his action was protected symbolic speech.⁶⁸³ According to the Court, a law prohibiting destruction of Selective Service certificates "no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records."⁶⁸⁴ Justice Warren concluded that the "many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained de-

677. *Id.*

678. *The Nuremberg Trials and Objection to Military Service in Viet-Nam*, 66 PROC. AM. SOC'Y INT'L L. 140, 172 (1969) (comments of Professor John E. Fried).

679. Army Field Manual, *supra* note 399, at 189, para. 500 (punishing conspiracy, direct incitement, attempts to commit as well as complicity in the commission of war crimes, crimes against humanity and crimes against the peace).

680. See generally MICHAEL FERBER & STAUGHTON LYND, *THE RESISTANCE* (1971).

681. *United States v. O'Brien*, 391 U.S. 367 (1967).

682. *Id.* at 369-70.

683. *Id.* at 376-80.

684. *Id.* at 375.

struction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them.”⁶⁸⁵

The Court’s dismissal of O’Brien’s first amendment claim was not thoroughly convincing.⁶⁸⁶ In 1965, at the time Congress voted to punish the burning of certificates, such conduct already was punishable under the “nonpossession” provision of the Selective Service Act.⁶⁸⁷ Congress’ stated purpose in adopting the 1965 amendment was to deter the public destruction of draft cards and registration certificates which it believed encouraged individuals to defy the draft.⁶⁸⁸ It certainly could not be contended that the destruction of a certificate which merely recited basic demographic information merited the specified punishment of a ten thousand dollar fine or imprisonment of five years, or both.⁶⁸⁹ The judiciary clearly feared that the extension of first amendment protection to the burning of registration certificates would encourage even more extreme acts of anti-war protest. What would be next, queried the Second Court of Appeals, “turning on water faucets, dumping of garbage in front of City Hall, stalling cars at an event attracting heavy traffic, burning an American flag on a street corner, or tearing up on television a court order or a document required to be kept under internal revenue regulations.”⁶⁹⁰ Their first amendment claim having been rejected, disobedients invoked other promising criminal defenses.

In *State v. Marley*,⁶⁹¹ Marley, an absent without leave (AWOL) sailor, and seven other defendants entered and occupied the offices of the Honeywell Corporation to protest Honeywell’s manufacture of anti-personnel weapons being used in Vietnam. The defendants were arrested and convicted of trespass.⁶⁹² The Supreme Court of Hawaii rejected the defendants’ claim of necessity.⁶⁹³ The Court ruled that the harm sought to be prevented by the defendants could not be considered imminent since it was occurring several thousand miles away. In addition, it was not reasonable for the defendants to believe that their actions would halt Honeywell’s production of war material. Finally, the Supreme Court of Hawaii deter-

685. *Id.* at 380.

686. *United States v. O’Brien*, 391 U.S. at 380.

687. *Id.* at 371.

688. *Id.* at 387-88.

689. *Id.* at 387.

690. *United States v. Miller*, 367 F.2d 72, 79 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1966), *reh’g denied*, 392 U.S. 917 (1967).

691. *State v. Marley*, 509 P.2d 1095 (Hawaii, 1973).

692. *Id.* at 1099.

693. *Id.* at 1109.

In essence, the “necessity” defense exonerates persons who commit a crime under the “pressure of circumstances,” if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants’ breach of the law.

Id.

mined that there was no necessity to violate the law since noncriminal avenues of protest were available to the defendants to enable them to dramatize and terminate the conduct which they reasonably believed to be harmful.⁶⁹⁴ Thus, "[e]ven assuming that Honeywell is a war criminal, the applicable law does not give these defendants either a right or a duty to be present without invitation on the Honeywell premises."⁶⁹⁵

The *Marley* Court also rejected the so-called Nuremberg defense--the defendants' contention that they were obligated to act to prevent the commission of Nuremberg crimes. The Supreme Court of Hawaii ruled that they were prevented by the political question doctrine from inquiring into whether the United States government was violating its "own treaty obligations."⁶⁹⁶ In addition, the Court ruled that ordinary citizens and soldiers were not liable under Nuremberg and consequently did not possess a duty to act to prevent the commission of war crimes. As a result, the defendants were deemed to lack standing to raise the Nuremberg defense.⁶⁹⁷

In *United States v. Berrigan*,⁶⁹⁸ the defendants were charged with the destruction of draft records. They contended that their actions were justified by their good motive--the halting of an "immoral and illegal" conflict in which the United States was "violating certain precepts of international law, constitutional law, and judgments which were handed down at Nuremberg."⁶⁹⁹ The District Court ruled that "once the commission of a crime is established--the doing of a prohibited act with the necessary intent--proof of a good motive will not save the accused from conviction."⁷⁰⁰ The Court explained that:

No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief. It matters not how worthy his motives may be. It is axiomatic that chaos would exist if an individual were permitted to impose his beliefs upon others and invoke justification in a court to excuse his transgression of a duly-enacted law.⁷⁰¹

In rejecting the good motive defense, the Court noted that the reasonableness of the defendants' belief that the government was acting

694. *Id.* at 1109. The defendants also sought to rely on the justification defense--the prevention or termination of a crime by another. The Court, however, ruled that the crime must take place in the defendants' presence. *State v. Marley*, 509 P.2d at 1108.

695. *Id.* at 1110.

696. *Id.* at 1110.

697. *Id.* at 1110-11.

698. *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968), *aff'd sub nom.*, *United States v. Ebherhardt*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970).

699. *United States v. Berrigan*, 283 F. Supp. at 338.

700. *Id.*

701. *Id.* at 339.

illegally in Vietnam is irrelevant. "[F]or even if it were demonstrable that the United States is committing violations of international law, this violation by itself would afford the defendants no justifiable basis for their acts."⁷⁰² The defendants' belief concerning the legality of United States conduct in Vietnam does not "go to the question whether they sincerely and honestly believed that their acts were lawful and thus negate the specific intent necessary for conviction, namely willfulness."⁷⁰³ In the related case of *United States v. Moylan*,⁷⁰⁴ the Court noted that while a morally motivated act contrary to the law may be ethically justified, the defendant must accept that his act is neither legally justified nor immune from punishment.⁷⁰⁵

Rulings in cases such as *Marley* and *Berrigan* were used as precedents by other courts to prevent defendants from invoking defenses which relied upon the United States' commission of war crimes in Vietnam as a justification for their putatively criminal acts.⁷⁰⁶ In *United States v. Dougherty*⁷⁰⁷ members of the so-called "D.C. Nine" entered and vandalized the offices of Dow Chemical Company to protest and halt Dow's manufacture of napalm which was used to commit alleged war crimes in Vietnam.⁷⁰⁸ The defendants appealed the trial court's refusal to instruct the jury of their right to disregard the law and to acquit the defendants.⁷⁰⁹ The defendants argued that recognition of the jury's inherent and democratic right to acquit the defendants based upon considerations of equity, morality, and the community's sense of justice was an indispensable check against prosecutorial and judicial abuse.⁷¹⁰

The District of Columbia Court of Appeals recognized the his-

702. *Id.*

703. *Id.* at 340 [italics omitted]. The *Berrigan* court also rejected the Nuremberg defense. It held that the defendants lacked standing to raise the defense. *United States v. Berrigan*, 283 F. Supp. at 341. The Court also held that the legality of United States conduct under international law was a political question. *Id.* at 342.

Whether the actions by the executive and the legislative branches in utilizing our armed forces are in accord with international law is a question which necessarily must be left to the elected representatives of the people and not to the judiciary. This is so even if the government's actions are contrary to valid treaties to which the government is a signatory.

Id. at 342.

704. *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (several of the defendants in *Berrigan* participated in another action involving the destruction of draft records).

705. *Id.* at 1008. Religious motive also was rejected as a defense. *See United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971).

706. *See United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972) (defendants not legally justified in attempting to seize and destroy selective service records as a protest against the Vietnam War).

707. *United States v. Dougherty*, 473 F.2d 1113 (D.C.C. 1972).

708. *Id.* at 1116-17.

709. *Id.* at 1117, 1130.

710. *Id.* at 1130-32.

torical prerogative of jury nullification.⁷¹¹ The Court, however, argued that the jury is well-aware of its right to depart from the requirements of the law. The issuance of a nullification instruction only would encourage the frequent and casual invocation of this privilege and lead to the denigration of the law.⁷¹² According to the Court, jurors already experience extreme difficulty in reaching an agreement on verdicts without imposing the additional burden of evaluating the merits of various legal rules. Thus "[w]hat makes for health as an occasional medicine would be disastrous as a daily diet."⁷¹³

Judge David Bazelon, concurring in part and dissenting in part, argued that jury nullification permits the jury to introduce a sense of "fairness and particularized justice The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed."⁷¹⁴ He admonished his brethren:

If revulsion against the war in Southeast Asia has reached a point where a jury would be unwilling to convict a defendant for commission of the acts alleged here, we would be far better advised to ponder the implications of that result than to spend our time devising stratagems which let us pretend that the power of nullification does not even exist.⁷¹⁵

Judges thus effectively closed the courtroom to evidence concerning war crimes in Vietnam. They refused to permit defendants to transform the judicial forum into a platform for the articulation of what they viewed as political grievances.⁷¹⁶ Some defendants lost faith in the ability of the judicial system to fairly adjudicate the claims of war resisters. They began to directly challenge judges and disrupt the courtroom.⁷¹⁷ Some suggested that those judges who refused to permit war resisters to present a defense, like their German counterparts, were in complicity with war crimes.⁷¹⁸ One law professor proclaimed that such "moral indignation" was a "reaction to real inequities and iniquities. The halls of justice must themselves be

711. *Id.* at 1132.

712. *United States v. Dougherty*, 473 F.2d at 1135.

713. *Id.* at 1136.

714. *Id.* at 1142 (Bazelon, J., concurring in part, dissenting in part).

715. *Id.* at 1144.

716. *See id.* at 1144-46 (Adams, J., concurring in part, dissenting in part).

717. *In Re Dellinger*, 461 F.2d 389 (7th Cir. 1972); *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972).

718. *The Justice Trial*, 6 LAW REP. OF TRIAL OF WAR CRIMINALS 1, 49 (U.N. War Crimes Comm'n American Mil. Trib. Nuremberg, Germany 1947). "The very essence of the prosecution case is that the laws, the Hitler decrees and the draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime." *Id.*

cleansed before those who are dragged inside them may be expected to show any respect."⁷¹⁹ The Supreme Court responded to this challenge in *Illinois v. Allen*.⁷²⁰ The Court proclaimed that the "citadels of justice" cannot and must not be "infected with the . . . scurrilous, abusive language and conduct."⁷²¹ The Court authorized judges to cite disruptive defendants for contempt and, if necessary, to bind and gag or to remove them from the courtroom.⁷²²

Others pointed to the unfairness of prosecuting civil disobedients for protesting a war whose legality remained uncertain and open to debate.⁷²³ Legal philosopher Ronald Dworkin called for a tolerant attitude towards resisters, arguing it offended due process to prosecute and convict offenders at the same time that courts were invoking the political question doctrine to avoid adjudicating the legality of the war.⁷²⁴ Dworkin argued that it simply was "unfair to punish men for disobeying a doubtful law."⁷²⁵ Others forthrightly called for courts to recognize individuals' Nuremberg Privilege to halt the Vietnam War and contended that acts of civil disobedience against the war were legally justifiable expressions of their prerogative to protest and to halt war crimes.⁷²⁶ Richard Falk argued that Nuremberg was both a *sword* to prosecute war criminals and a *shield* which protected those who acted to uphold the rule of international law.⁷²⁷ He argued that

there are grounds to maintain that anyone who believes or has reason to believe that a war is being waged in violation of minimal canons of law and morality has an obligation of conscience to resist participation in and support of that war effort by every means at his disposal. In that respect, the Nuremberg Principles provide guidelines for citizens' conscience and a *shield* that can be used in the domestic legal system to interpose obligations under international law between the government and members of the society.⁷²⁸

The judiciary, however, refused to modify its formalistic approach to the adjudication of protest cases. Judges felt compelled to

719. Graham Hughes, *In Defense of Disruption*, 30 THE ANTIOCH REV. 171, 176 (1970).

720. 397 U.S. 337 (1969).

721. *Id.* at 347.

722. *Id.* at 344.

723. See generally Hughes, *supra* note 378.

724. Ronald Dworkin, *Civil Disobedience*, in TAKING RIGHTS SERIOUSLY 206 (1977).

725. *Id.* at 221.

726. Richard A. Falk, THE CIRCLE OF RESPONSIBILITY, in Falk, Kolko & Lifton, *supra* note 382, at 222, 229-30.

727. *Id.*

728. *Id.* at 230. See also Richard A. Falk, *The Nuremberg Defense in the Pentagon Papers Case*, 13 COLUM. J. TRANSNAT'L L. 208 (1974). But see Charles E. Patterson, *The Principles Of Nuremberg As A Defense To Civil Disobedience*, 37 MO. L. REV. 33 (1972).

support the war effort and tended to view dissenters as unpatriotic.⁷²⁹ In his opinion in *United States v. Sisson*,⁷³⁰ Judge Charles E. Wyzanski recognized the bias inherent in domestic courts and conceded that:

It is inherent in a tribunal composed partly of judges drawn from the alleged offending nation that a wholly disinterested judgment is most unlikely to be achieved [A] domestic tribunal is entirely unfit to adjudicate the question whether there has been a violation of international law during a war by the very nation which created, manned, and compensated the tribunal seized of the case.⁷³¹

Courts expressed the fear that judicial tolerance of civil disobedience would lead to anarchy.⁷³² Yet, protesters merely were insisting that the rule of law should be respected at home as well as abroad.⁷³³ Was it protesters or the United States disregard for the law in Vietnam which was eroding respect for the legal system? The Government clearly was willing to apply all its legal resources and to compromise fundamental legal protections in order to dampen domestic protest against the war. The aphorism used in Vietnam, "that we had to destroy the country in order to save it," at times seemed to capture the government's approach to the American constitutional system. In *New York Times v. United States*,⁷³⁴ Justice Black noted the dangerous implications of President Nixon's attempt to impose a prior restraint upon the Washington Post and New York Times' publication of the *Pentagon Papers*.⁷³⁵

To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative

729. See generally MICHAEL LINFIELD, FREEDOM UNDER FIRE U.S. CIVIL LIBERTIES IN TIMES OF WAR 113-56 (1990).

730. *United States v. Sisson*, 294 F. Supp. 515 (D. Mass. 1968).

731. *Id.* at 517.

732. See JOHN F. BANNAN & ROSEMARY S. BANNAN, LAW, MORALITY AND VIETNAM THE PEACE MILITANTS AND THE COURTS 186-87 (1974).

733. *Id.* at 15.

734. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

735. *Id.* at 718 (Black, J., concurring).

government provides no real security for our Republic.⁷³⁶

In sum, during the Vietnam War Lady Justice had a schizophrenic personality. The law of war was applied on rare and infrequent occasions against those who committed war crimes in Vietnam⁷³⁷ while high-echelon civilian and military leadership largely were immune from legal accountability.⁷³⁸ In contrast, those who violated the law in an effort to protest or to halt war crimes were subjected to prosecution. Courts, in rejecting dissidents' legal defenses, explained that civil disobedients threatened to erode the rule of law.⁷³⁹ Robert Lifton observed that the effort to silence dissent was an expression of America's psychological need to avoid confronting the consequences of the Vietnam War--an effort to muffle the message by massacring the messenger.⁷⁴⁰

III. Conclusion: Vietnam and War Crimes

The history of Vietnam is characterized by a continual effort to assert self-determination against a succession of foreign powers which attempted to dominate the country. America found itself bogged down in a guerilla war and responded by relentlessly escalating the conflict.

The domestic debate over the war within the legal profession centered on the legality of the America effort in Vietnam. The organized Bar and the Government viewed the American effort as a justified exercise of collective self-determination. Opponents of the war, in contrast, argued that the United States was illegally intervening in a civil war. These differing conceptions of the war provided the foundation upon which technical legal arguments were constructed. The American judiciary refused to enter into the political thicket and to definitively determine the legality of the war. This perpetuated the uncertainty concerning the justification for the war and sent a strong signal to civilian and military officials that they were free to prosecute the war free of legal constraint. As a result, little effort was made to justify the legality of military strategies and tactics.

The United States proceeded to launch a virtually unparalleled war of annihilation against a third world rural society. Atrocities such as My Lai were portrayed as the exception. However, such massacres arguably were the norm. The occasional prosecution of American GI's diverted attention from the fact that there was a

736. *Id.* at 719 (Black, J., concurring).

737. See generally *supra* notes 497-570 and accompanying text.

738. See generally *supra* notes 571-656 and accompanying text.

739. See generally *supra* notes 670-715 and accompanying text.

740. LIFTON, *supra* note 500, at 360-61.

yawning gap between the United States formal adherence to the humanitarian law of armed conflict and the reality of the Vietnam War. The law of war largely was ignored and violated with impunity.

The Nuremberg Tribunal generally limited liability to high-echelon officials.⁷⁴¹ In his opening argument, Robert Jackson emphasized that these were the people with "brains."⁷⁴² The men of a "station and rank which does not soil its own hands with blood . . . [who] knew how to use lesser folk as tools . . . [these were] the planners and designers, the inciters and leaders."⁷⁴³ In contrast, the few American war crimes trials which occurred during Vietnam focused on the crimes committed by ordinary combatants and low-level officers. Those who planned and directed the strategies and tactics which led to these crimes were not held accountable. At Nuremberg, Sir Hartley Shawcross, Chief Prosecutor of the United Kingdom emphasized that the moral "guilt of Germany will not be erased for the people of Germany share it in large measure."⁷⁴⁴ Many Americans refused to silently witness the crimes of their country in Vietnam. Yet, it was precisely those who protested and refused to participate in the war who were singled out for criminal prosecution and punishment.

It is ironic that we continue to concern ourselves with bringing Nazi war criminals to justice while we overlook that those responsible for crimes in Indochina continue to occupy positions of respect and responsibility in the United States.⁷⁴⁵ Can we expect other nations to abide by international humanitarian law when we persist in refusing to apply it to ourselves? It is striking that during the Vietnam War the war crimes issue largely was ignored by the American legal profession and by international legal scholars.⁷⁴⁶ Intellectuals generally focused on the more cerebrally challenging, but less vital question of the legality of United States intervention in Vietnam.⁷⁴⁷

The political history of the war currently is being written by the

741. *Trial Of The Major War Criminals*, *supra* note 600, at 467-68. the Tribunal limited liability to high echelon officials who were present at planning sessions for wars of aggression. *Id.*

742. II THE TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 600 at 104.

743. *Id.* at 105.

744. XIX TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 600, at 434.

745. See generally James W. Moeller, *United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law, and the Need for International Cooperation*, 25 VA. J. INT'L L. 793 (1985).

746. But see *Vietnam And The Nuremberg Principles: A Colloquy On War Crimes*, 5 RUT.-CAM. L.J. 1 (1973). See also *LAW AND RESPONSIBILITY IN WARFARE THE VIETNAM EXPERIENCE* (Peter D. Trooboff & Arthur J. Goldberg eds. 1975). A compilation of accounts of war crimes as reported by Vietnam veterans is contained in *Vietnam Veterans Against the War, THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES* (1972).

747. See generally *supra* notes 264-302 and accompanying text.

Americans and little attention is being paid to the price paid by the Vietnamese.⁷⁴⁸ There are no major memorials to the mass of innocent Asian victims. Americans seems to be searching for vindication rather than confronting their culpability for war crimes. The reality is that most Americans during the Vietnam War, like the "masses of the home-loving German people," were "more content to have a little garden in which to grow a plant or two" than to face the reality of their country's military policies.⁷⁴⁹ Yet, as observed by an American war crimes tribunal following World War II, "[n]o one can shrug off so appalling a moral responsibility with the statement that there was no point in trying."⁷⁵⁰

748. It is striking how little attention is paid to American war crimes in the contemporary political histories of the war. See generally KARNOW, *supra* note 44.

749. United States v. Ohlendorf, *supra* note 639, at 485.

750. *Id.* at 482.

